115-408

115-408

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~912.~~ 563

PHILANDER E. SPARKS AND FRANK M. ALLEN,
APPELLANTS.

vs.

MOSES PIERCE, GEORGE BERGHOFFER, JAMES McALEER,
AND MARY BOYLE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

FILED SEPTEMBER 5, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 912.

PHILANDER E. SPARKS AND FRANK M. ALLEN,
APPELLANTS.

vs.

MOSES PIERCE, GEORGE BERGHOFFER, JAMES McALEER,
AND MARY BOYLE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

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1 TERRITORY OF DAKOTA, }
First Judicial District, } *ss:*

In the District Court in and for Lawrence County.

MOSES PIERCE, GEORGE BERGHOFFER, JAMES MCALEER, and MARY A. BOGLE

vs.

PHILANDER E. SPARKS and FRANK M. ALLEN, Copartners as Sparks & Allen.

The Territory of Dakota sends greeting to the above-named defendants:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the district court within and for the county of Lawrence, Territory of Dakota, at the court-house in the city of Deadwood, county of Lawrence, D. T., and to serve a copy of your answer on the subscribers at their office on Lee street, in the city of Deadwood, Dakota Territory, within thirty days after the service of this summons, exclusive of the day of service. If you fail to answer the complaint within that
2 time, the plaintiff- will apply to the court for the relief demanded in the complaint.

Dated at Deadwood, D. T., this 15th day of April, A. D. 1883.

VAN CISE, WILSON & MARTIN,
Plaintiffs' Attorneys.

3 TERRITORY OF DAKOTA, *County of Lawrence:*

I hereby certify and return that the within summons came into my hands on the 15th day of April, 1882, and that I served the same on the within-named Philander E. Sparks, defendant, personally by delivering to and leaving with him a true copy thereof, in Lawrence county, D. T., on the 17th day of April, 1882.

JOHN P. BELDING, *Sheriff*,
By GEORGE ATCHISON, *Deputy.*

4 [Endorsed:] Territory of Dakota. In district court, Lawrence county. Summons for relief. Complaint filed. Moses Pierce *et al.* against Philander E. Sparks *et al.* Van Cise, Wilson & Martin, attorney-.

5 In District Court, First Judicial District of Dakota Territory in and for the County of Lawrence.

MOSES PIERCE, JAMES MCALEER, GEORGE BERGHOFFER, and MARY E. BOGLE, Pl'ffs,

vs.

PHILANDER E. SPARKS and FRANK M. ALLEN, Def'ts.

The plaintiffs complain and allege:

That on the 11th day of December, 1878, they were the owners and seized in fee and lawfully possessed of that certain real property hereinafter described, situate in Lawrence county, Dakota Territory, deriving their title thereto from an entry and purchase thereof from the United States Government November 30th, 1877, which entry was subsequently confirmed by patent March 22, 1880.

Said real property is described as follows:

6 The certain Placer mining ground known as mineral lot No. 40, embracing a part of the unsurveyed public domain in Lost Placer mining district, containing $3\frac{81}{100}$ acres, more or less, as particularly described in said patent, recorded at page 507 of 1 book No. 11, in the office of the register of deeds of said Lawrence county.

2. That while the plaintiffs were such owners and so seized and possessed and entitled to the possession of said real property and premises, the defendant afterwards, to wit, on or about December 12th, 1878, did, without right or title, enter into and upon the same, and particularly the portion thereof described as a tract fronting 18 feet on the Deadwood road, and running back a uniform width 80 feet to the northerly line of said mineral lot No. 40, near corner No. 4 thereof, and at the mouth of Hidden Treasure Gulch, and did then and there oust and eject plaintiffs therefrom, and ever since that day have withheld, and still unlawfully withhold, the possession thereof from plaintiffs, to their damage in the sum of five hundred dollars.

7 3. That the value of the rents and profits of said real property and premises from the said 12th day of December, 1878, and while the plaintiffs have been excluded therefrom, is ten dollars for each and every month.

Whereupon plaintiffs demand judgment against said defendants—

For the recovery of possession of the real property and premises so wrongfully witheld by defendants.

2. For the sum of $500 damages for the wrongful witholding thereof.

3. For the sum of ten dollars per month since December 12th, 1878, the value of the rents and profits thereof.

4. For the costs of this action.

VAN CISE & WILSON.
Att'ys for Pl'ffs.

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8 In the District Court of the First Judicial District of Dakota Territory in and for Lawrence County.

MOSES PIERCE, GEORGE BERGHOFFER, JAMES McALEER, and MARY E. BOGLE, Pl'ffs,

vs.

PHILANDER E. SPARKS and FRANK M. ALLEN, Def'ts.

Now come the defendant- and, in answer to the plaintiffs' complaint, denies each and every allegation thereof, except as hereinafter stated.

First. For a further answer and defense, and by way of a counterclaim, the defendant-, upon information and belief, alleges that on

the 28th day of February, 1877, the premises described in plain-
9 tiffs' complaint, together with others, were lawfully selected,
appropriated, located, used and occupied for and as a town
site and for town site purposes, and as such was laid out into lots,
blocks, streets, and alleys, and known and designated as Central City.

That said town was upon said day lawfully selected and had been duly located upon the unappropriated public lands of the United States, and laid out into lots, blocks, streets, and alleys, at which time it contained a population of about one hundred inhabitants, and henceforth grew with great rapidity until the 22d day of March, 1880, the date of the plaintiffs' patent, as set forth in the complaint, at which time it was an important town, containing a population of about two thousand inhabitants.

That on said 28th day of February the —— grantor of defendant-
was in the peaceable and lawful occupation and possession, under a
claim of ownership, of the land described in the complaint as de-
tained by the defendant-, the same being in and a part of said Central
City, and known as and called lot No. 53, situated on the
10 northwest corner of Hidden Treasure and Main streets, being
17 feet front on Main street and running back a depth of
80 feet, and that said lot, with the improvements thereon, was pur-
chased by defendants on December 12th, 1878, for a valuable con-
sideration, in good faith, who now owns the same by a regular chain
of conveyances from the original locator and occupant thereof on
February 28th, 1877.

That said land was at the last-named date, ever since has been, and now is, within the limits of said Central City town site, and was one of the lots therein so originally located, laid out, used, and occupied for trade and town site purposes, as hereinbefore stated; and that the same during all that time has been by the defendants and their grantors occupied as a town lot for the purpose of business and trade in said city, and not for agriculture, with improvements thereon, consisting of buildings which have since, from time to time, been improved and kept repaired.

That after the said 28th day of February, and prior to the
11 30th day of November, 1877, the plaintiffs, without any legal
right, caused certain ground on Deadwood Gulch, including
a part of said town site of Central City, and all of the ground in
controversy, to be surveyed as and for a Placer mining claim, and
called the same number 12 above discovery, and caused an applica-
tion for a patent, based upon said survey, to be filed in the U. S.
land office at Deadwood, in said county of Lawrence.

That said Placer claim, as first located, did not embrace the said lot of defendant-, and was not located until long after the said appropriation of said lot for town site purposes as aforesaid.

That after said application for patent, which included defendants' lot, and within the time required by law, the inhabitants of said town, including the grantors of defendants, protested in writing, filed in said land office, against the issuing of the patent so applied for, basing said protest upon the ground, among others, that said land was subject to the prior rights of the town-site occupants,

including the defendants' grantors, under the law, and also
12 upon the further ground that said land was not mineral, and
so could not be patented to plaintiffs as such, but that notwithstanding said protest the said local land officers, on the 30th day of November, 1877, received from plaintiffs the sum of $2.50 per acre for said Placer claim No. 12, and the fees provided by law, and issued to them a receipt therefor, which payment and receipt are commonly called on entry.

That thereafter, and on the 22d day of April, 1878, the Commissioner of the General Land Office reviewed said proceedings, application for a patent, and protest, and directed that patent issue to said applicants for patent for said Placer mining claim, but with an exception or reservation excepting and reserving from the grant therein all town property, rights upon the surface, and *and* all lots, blocks, streets, and alleys, and all houses, buildings, and improvements thereon not belonging to said plaintiff-, and all rights necessary and proper to the occupation and enjoyment of the same;
which said ruling and decision was wholly in accordance
13 with law, and according to the long established and settled
practice of the Department of the Interior in such cases.

That thereafter, to wit, on November 7th, 1878, and without any appeal having been taken from said decision, said Commissioner made an order suspending said entry, and ordered that a hearing be had before the officers of said local land office, to determine the date when said land was first occupied as a town, the character and extent of such occupancy and the improvements thereon, and whether the land was mineral or non-mineral in character; which hearing was commenced before said local officers on the 26th day of November, 1878.

That upon such hearing both parties submitted their testimony, after which, on the 20th day of January, 1879, said local officers decided in substance that the said land was valuable for minerals, but had been appropriated for town site purposes prior to any appropriation by plaintiffs, and that the land should be awarded to the occupants
of said Central City town site, including the defendants, subject
14 to the right of the plaintiffs to mine and extract the gold
therefrom, if, in so doing, they did not materially interfere with the possession, buildings, and improvements of said town occupants, including the defendants.

That both the said town occupants and the said plaintiffs were satisfied with said decision, and no appeal was taken therefrom by either party, but on the contrary an appeal therefrom was especially waived by both parties; that thereafter, in the absence of any appeal, and notwithstanding said waiver of appeal, and on the 6th day of October, 1879, the said Commissioner reviewed said decision and decided that said town site claimants and occupants, including defendants, had no right whatever to the land, upon the sole ground that it was mineral, and, therefore, not subject to appropriation, except under the mineral law of 1872, and that said land of the defendant, with his improvements, was the property of the plaintiffs.

That at said hearing and review there was no dispute as to the

fact that the said town site claimants and occupants were the first appropriators of the land, and that defendant- and those through
15 whom they claimed had acquired an interest in and occupied
and used the premises in controversy in this suit for the purposes hereinbefore stated prior to any appropriation on the part of plaintiff. Yet, notwithstanding these undisputed facts, said Commissioner decided that the fact of such prior appropriation as aforesaid gave no rights to the inhabitants or occupants of said town site or land, nor to the defendant-.

That said decision was based upon the sole ground that the land was mineral in character, and, therefore, no recognition or protection could be afforded, under any law, to the rights or claims of said town site occupants, or to the defendants, in or to the said lands or improvements thereon, or any part thereof, but were the property of plaintiffs as aforesaid.

Whereupon said Commissioner dismissed said protest, and wrongfully and illegal-y directed a patent to issue to plaintiffs for said lands as mineral lot No. 40, without any exception or reservation therein to protect the possession and improvements of defendants and
16 their grantor, or any of said town occupants, which patent
was thereafter, on March 22, 1880, issued accordingly, and which patents constitute plaintiffs' title in this suit.

Whereas said patent should have contained a reservation excepting therefrom all town property, rights, and all houses, buildings, structures, lots, blocks, streets, and alleys, and other improvements on said land not belonging to plaintiffs, and all rights necessary or proper to the occupation, possession, and enjoyment of the same, as by law in such case made and provided.

That said decision of said Commissioner last referred to, and the granting of said land to plaintiffs without excepting and reserving the possession, improvements, and rights of defendants and other town occupants, were contrary to law, and was, and are, erroneous contradictions of the law, with reference to the rights of defendants and other of said town site occupants, upon said undisputed facts as to said priority of appropriation for town site purposes; and by reason thereof and of the said patent issued in pursuance thereof the plaintiffs have acquired, and now hold in trust for the defend-
17 ants, the above-described piece of ground, now in contro-
versy in this suit, and all improvements thereon, which should be conveyed by plaintiff- to defendant-.

That defendant has always been, and now is, ready and willing, and hereby offers, to pay to plaintiffs his just proportion of the legal expense in procuring said patent or conveyance.

Second. For a further defense and counter-claim defendant- allege. On the 28th day of February, 1877, the premises in controversy was lawfully appropriated for town site purposes, as stated in the preceding and first defense contained in this answer.

That the allegations of said defense in relation to the town site of Central City, from its first location to and including the award of said patent to plaintiffs, are referred to now and made a part of this counter-claim, with the same effect as though all such allegations were fully restated in said defense.

That on said 28th day of February one F. J. Ames, being
18 one of the inhabitants of said town site, was in the peaceable
and lawful occupancy and possession, claiming to be the owner thereof, of the premises in controversy in this action, as described in the said first defense herein, at which time said Ames had a building and other improvements thereon, and that during all the time thereafter, up to and until and at the time of the sale and conveyance of said premises to defendant, as hereinafter stated, the said Ames remained in the conti*g*-ous occupation and possession of said premises, occupying and using the same as a town lot for the purpose of business and trade, claiming title thereto in good faith against all persons except the United States, and claiming the right to acquire the title of the United States thereto as a town lot.

That thereafter, to wit, on the 12th day of December, 1878, and while the said Ames was so as aforesaid in the lawful, quiet, and peaceable possession and occupation of said premises, claiming title thereto, he did, for a valuable consideration, sell, and by a good and sufficient deed convey, the said premises to the defendant, who in good faith purchased the same, and received the said deed
19 and the possession of said premises from said grantor, and
have at all times and until the commencement of this action, occupied and possessed said premises under said deed, claiming title thereto, in good faith, adversely to the plaintiffs, and before the plaintiffs acquired any title thereto, defendants, in good faith, made permanent improvements upon said premises, which improvements and the value thereof are more particularly set forth, as follows:

One frame building, one story high, 40 by 17 feet in dimensions, of the value of $750.00; also in the rear thereof a brick fire-proof building, 13 by 40 feet in size, of the value of $750.00. That said values are independent of the ground, and said premises are used in the grocery business.

That the value of said land, aside from the said improvements thereon, will not exceed the sum of one hundred dollars.

Wherefore defendants pray—

1st. That the plaintiffs take*s* nothing by this suit.

20 2. That plaintiffs be decreed to convey to the defendants
said premises in controversy, excepting and reserving to the plaintiffs in such conveyance the right to mine and extract the precious metals from said premises, provided that in so doing the plaintiffs shall not materially injure, endanger, or interfere with the buildings and improvements thereon, and the necessary use, occupation, and enjoyment of the premises by defendants.

3d. That in the event that it should be determined that the plaintiffs are the owners of and entitled to the possession of said premises, then that the value of the land, aside from the value of the improvements thereon, and also that the separate value of the improvements be specifically found, and that the defendants have judgment for the value of their said improvements.

Demurrer.

In District Court, First Judicial District of Dakota Territory, in and for Lawrence County.

MOSES PIERCE *et al.*
vs.
PHILANDER E. SPARKS *et al.* } Demurrer.

The plaintiffs demur to the first defense and counter-claim of defendants upon the ground—

That the same does not state facts sufficient to constitute a defense to this action or a counter-claim in defendants' favor against plaintiffs.

Plaintiffs also demur to the second defense and counter-claim of defendants upon the ground—

That the same does not state facts sufficient to constitute a defense to this action or a counter-claim in defendants' favor against plaintiffs.

VAN CISE & WILSON,
Attorneys for Plaintiffs.

In the Supreme Court of the United States. October Term, 1885.

PHILANDER E. SPARKS *et al.*, Appellants,
vs.
MOSES PIERCE *et al.* } No. 563.

It is hereby stipulated and agreed by and between the above-named parties, through their counsel, that the foregoing and annexed demurrer constitutes a part of the record in the above-entitled cause, and was omitted therefrom as forwarded to the clerk of the Supreme Court of the United States, through a clerical error; and that it may be by the said clerk inserted in and made a part of the record in said case, in its proper place, immediately following the defendants' and appellants' answer, and printed as a part of the transcript, with the same force and effect as though it had been transmitted by the clerk of the supreme court of the Territory with the rest of the transcript.

Dated August 24th, 1885.

G. C. MOODY,
Counsel for Appellants.
VAN CISE & WILSON,
J. W. SMITH,
Counsel for Appellees.

[Endorsed:] Supreme Court U. S. October term, 1885. No. 563. Philander E. Sparks *et al.*, app'ts, *vs.* Moses Pierce & *al.* Stipulation of counsel & addition to record. Office Supreme Court U.S. Filed Sep. 2, 1885. James H. McKenney, clerk.

4th. For such other and further relief as may be just, with costs.

ALBERT ALLEN,
Defendants' Attorney.

21 *Order on Demurrer.*

In District Court, First Judicial District of Dakota Territory in and for Lawrence County.

MOSES PIERCE *et al v.* P. E. SPARKS *et al.*

On reading and filing the demurrer of plaintiff- to the first and second defense and counter-claims of defendants, after hearing Messrs. Van Cise & Wilson, counsel for plaintiffs, in support thereof, and Messrs. Albert Allen and W. C. Kingsley, in opposition thereto:

Ordered, That the said demurrers be, and they are each of them hereby, sustained, with leave to defendants to serve an amended answer within thirty days.

Done this 21st day of September, 1883.

By the court: WILLIAM E. CHURCH, *Judge.*

22 To which order and ruling of the court sustaining plaintiffs' demurrer to the first defense and counter-claim in defendants' answer the defendants, by their counsel, at the time duly except, and at their request this their exception is signed and ordered made a part of the record herein.

And to which order and ruling of the court sustaining the plaintiffs' demurrer to the second defense and counter-claim in defendants' answer the defendants, by their counsel, duly except, and at their request this their exception is signed and ordered made a part of the record herein.

Dated, Deadwood, D. T., Sept. 21, 1883.

WILLIAM E. CHURCH, *Judge.*

23 *Judgment.*

In District Court, First Judicial District of Dakota Territory in and for Lawrence County.

MOSES PIERCE, GEORGE BERGHOFFER, JAMES MCALEER, and MARY E. BOGLE, Pl'ffs,

vs.

PHILANDER E. SPARKS and FRANK M. ALLEN, Def'ts.

This action having come on to be heard upon an issue of law, to wit, the plaintiffs' demurrer to defendants' first and second defense and counter-claims, and the court, after hearing Messrs Van Cise & Wilson, counsel for the plaintiffs, on behalf of said demurrer, and Albert Allen and W. C. Kingsley, counsel for defendants, in opposition thereto, having made its order sustaining the said demurrer, with leave to defendants to amend, and counsel for defendants now declining to amend or plead further and waiving time and electing to stand upon the plead-

ings as filed and the ruling of the court, and counsel now in
24 open court waiving a jury and stipulating, without prejudice,
that the court may assess damages at one dollar, use and occupancy at one dollar, and costs at eight dollars:

Now, on motion of plaintiffs' counsel, it is ordered, considered, and adjudged that plaintiffs recover of and from the defendants the possession of the premises situate in Lawrence county, Dakota Territory, described as that portion of mineral lot No. 40, fronting 18 feet on the Deadwood road and running back a uniform width of 80 feet to the northerly line of said mineral lot, near corner No. 4 thereof, and at the mouth of Hidden Treasure Gulch. And it is further ordered and adjudged that plaintiff do have and recover of and from the said defendants the sum of one dollar damages, one dollar, the value of the use and occupancy, and eight dollars costs, in all the sum of ten dollars ($10), and that they have execution therefor.

Done in open court, this 21st day of September, 1883.

By the court: WILLIAM E. CHURCH, *Judge.*

25 Territory of Dakota, }
County of Lawrence, } *ss:*

In District Court in and for Lawrence County, First Judicial District, Dakota Territory.

Moses Peirce, James McAleer, George Berghoffer, and Mary Bogle, Plaintiffs,

vs.

Philander E. Sparks and Frank M. Allen, Defendants.

I, the presiding judge of said district court, who presided at the trial of the above-entitled cause, do hereby certify that the foregoing papers, to wit, the summons, complaint, answer, demurrer of plaintiffs to defendants' answer, order sustaining said demurrer, defendants' exception to said order, the judgment, are contained in and constitute the judgment roll, and the whole thereof, in the said above-entitled action, as the same now remains of record in the said district court.

Dated Deadwood, D. T., Sept. 22, 1883.

WILLIAM E. CHURCH, *Judge.*

26 [Endorsed:] Moses Pierce *et al. v.* Philander E. Sparks *et al.* Judgment roll. Filed Sept. 22, 1883. A. R. Z. Dawson.

27 In District Court of the First Judicial District of Dakota Territory within and for the County of Lawrence.

Moses Peirce, James McAlleer, George Berghoffer, and Mary E. Bogle, Plaintiffs,

vs.

Philander E. Sparks and Frank M. Allen, Defendants.

Take notice that the defendants in the above-entitled action hereby appeal to the supreme court at this Territory from the judgment rendered therein in the above district court on the 21st day of September, A. D. 1883, in favor of the plaintiffs in said action and against the defendants therein, and from the whole thereof, said judgment being for the recovery of possession of certain real property, and for the sum of one dollar damages, and one dollar, the value of the use and occupation of said premises, and the sum of eight dollars costs.

Dated this 22d day of September, A. D. 1883.

ALBERT ALLEN,
Attorney for Defendants.

To the clerk of the above district court and to Van Cise & Wilson, attorneys for plaintiffs.

28 [Endorsed:] In district court. Moses Peirce *et al. vs.* Philander E. Sparks *et al.* Notice of appeal. Filed Sept. 22d, 188–. A. R. Z. Dawson, clerk. Albert Allen, def'ts' attorney.

29 In the District Court of the First Judicial District of the Territory of Dakota within and for the County of Lawrence.

MOSES PIERCE, GEORGE BERGHOFFER, JAMES MCALEER, and MARY E. BOGLE, Plaintiffs,

vs.

PHILANDER E. SPARKS and FRANK M. ALLEN, Defendants.

Whereas on the 21st of September, 1883, judgment was rendered in the above-entitled action in favor of the plaintiff- and against the defendants for recovery of possession of certain real property, and for the sum of one dollar damages, and one dollar, value of the use and occupation of said real property, and the sum of eight dollars costs;

And whereas the defendants intend to appeal from the said judgment to the supreme court of this Territory:

Now, therefore, we, Philander E. Sparks, Lucius C. Miller, and
Edward Shannon, undertake, pursuant to the statute, that the said
appellants will pay all costs and damages which may be
30 awarded against them on the appeal, or on a dismissal
thereof, not exceeding two hundred and fifty dollars ($250.00).

And we do also undertake, pursuant to the statute, in the further sum of five hundred dollars ($500.00), that, during the possession of said property by the said appellants, they will not commit or suffer to be committed any waste thereon, and that if the judgment be affirmed, or the appeal dismissed, they will pay the value of the use and occupation of the said real property from the time of the said appeal until the delivery of the possession thereof, pursuant to the judgment.

PHILANDER E. SPARKS.
LUCIUS C. MILLER.
EDWARD SHANNON.

31 TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

Philander E. Sparks, Lucius C. Miller, and Edward Shannon, being each for himself severally duly sworn, doth each for himself, and not one for the other, say that he is a resident and freeholder of the Territory of Dakota, and that he is worth double the sum specified in the foregoing undertaking over all his debts and liabilities, and exclusive of all property exempt from execution by the laws of this Territory.

EDWARD SHANNON.
PHILANDER E. SPARKS.
LUCIUS C. MILLER.

Subscribed and sworn to before me, this 22 day of September, 1883.

[SEAL.] JOHN R. WILSON,
Notary Public.

32 TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

On this day before the undersigned, a notary public in and for said county and Territory, personally appeared Edward Shannon, Philander E. Sparks, and Lucius C. Miller, known to me to be the persons named in and who subscribed the foregoing undertaking, and acknowledged to me that they executed the same for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and notarial seal, this 22d day of September, A. D. 1883.

[SEAL.] JOHN R. WILSON,
Notary Public.

33 [Endorsed:] In district court. Moses Pierce *et al. vs.* Philander E. Sparks *et al.* Undertaking on appeal and notice of appeal. Due service of a copy of the within undertaking on appeal and attached notice of appeal admitted this 22nd day of September, 1883, and all objection to the form of said undertaking and the sufficiency of the sureties therein *and* hereby *named.* Van Cise & Wilson, att'ys for plaintiff. Albert Allen, def'ts' att'y.
34 Filed Sept. 22, 1883. A. R. Z. Dawson, clerk.

35 TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

First Judicial District.

I, A. R. Z. Dawson, clerk of the district court within and for the said county of Lawrence, in the first judicial district of the Territory of Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of the notice of appeal and proof of service, and of judgment roll, as follows: Summons, complaint, answer, order on demurrer, and defendants' exception to said order, judgment, and of the certificate of the judge in the above-entitled action, wherein Moses Pierce *et al.* is plaintiff and Philander E Sparks is defendant, as the same now remains of record in the said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 25th day of September, A. D. 1883.

[SEAL.] A. R. Z. DAWSON, *Clerk.*

36 [Endorsed:] No. 158. In district court, Lawrence county. Moses Pierce *et al. vs.* Philander E. Sparks *et al.* Summons, complaint, answer, order on demurrer, def's' exception to order, judgment, notice of appeal, proof of service, and certificate of judge. Filed Oct. 3d, 1883. B. S. Williams, clerk.

37 United States Supreme Court. October Term, A. D. 1883. 5th day of Term.

SATURDAY, *October* 6, 1883.

In the Supreme Court.

MOSES PIERCE *et al.*, Respondents,

vs.

PHILANDER E. SPARKS *et al.*, Appellants.

It is hereby stipulated by and between the parties appellants and respondents in the above cause that the said cause may be do-keted for argument and determination at the present October, 1883, term of the above court, with the same effect as though the abstract therein had been served and filed, and the briefs and points served and filed, in proper time to have been placed upon the calendar for said term. The parties hereto waiving service of abstracts and briefs.

ALBERT ALLEN,
Att'y for Appellants.
VAN CISE & WILSON,
Att'ys for Respondents.

38 In the Supreme Court, Territory of Dakota.

MOSES PIERCE *et al.*, Respondents,

vs.

PHILANDER E. SPARKS *et al.*, Appellants.

On the foregoing and attached stipulation ordered that this cause be do-keted and placed on the calendar of this court for hearing and determination at the present October, A. D. 1883, term of this court.

Done in open court, this 4th day of October, A. D. 1883.

By the court: A. J. EDGERTON.

Filed October 4th, 1883. B. S. WILLIAMS, *Clerk.*

39 U. S. Supreme Court. October Term, A. D. 1883. 8th day of Term.

WEDNESDAY, *October* 10, 1883.

ROBERT HAWKE, Resp'd't,
vs.
E. DEFEENBACH, Appellant.
} No. 156.

ROBERT HAWKE, Resp'd't,
vs.
DOLPH EDWARDS, Appellant.
} No. 157.

MOSES PIERCE *et al.*, Resp'd't,
vs.
P. E. SPARKS *et al.*, Appellants.
} No. 158.

And now, this 10 day of October, 1883, the above-entitled causes, numbered from 156 to 158, inclusive, came on for argument and hearing together, by consent of counsel and the permission of the court. Albert Allen, Esq., appearing for the appellant in each case.

40 U. S. Supreme Court. October Term, A. D. 1883. 9th day of Term.

THURSDAY, *October* 11*th*, 1883.

Court being duly opened, the following proceedings were had, to wit:

ROBERT HAWKE, Respondent,
vs.
EDWARD DEFFENBACH, Appellant.
} No. 156.

ROBERT HAWKE, Resp'd't,
vs.
DOLPH EDWARDS, Appellant.
} No. 157.

MOSES PIERCE *et al.*, Respondent-,
vs.
P. E. SPARKS *et al.*, Appellant-.
} No. 158.

And now comes Albert Allen, continuing his argument for appellant.

And now, at 11 o'clock a. m., comes A. J. Plowman, att'y for Robt. Hawke, the respondent in the above cause.

41 U. S. Supreme Court. October Term, A. D. 1883. 10th day of Term.

FRIDAY, *October 12th*, 1883.

Court being duly opened, the following proceedings were had, to wit:

ROBERT HAWKE, Respondent,
vs.
E. DEFFENBACH, Appellant. } No. 156.

ROBERT HAWKE, Respondent,
vs.
DOLPH EDWARDS, Appellant. } No. 157.

MOSES PIERCE *et al.*, Respondent-,
vs.
P. E. SPARKS *et al.*, Appellant-. } No. 158.

The above cause coming on for further argument, and now comes A. J. Plowman, Esq., for Robert Hawke, said respondent.

And now Edwin Van Cise, Esq., for Moses Pierce *et al.*, respondent, and Albert Allen, Esq., with closing argument for said appellants. And thereupon cause submitted to the court.

42 THE UNITED STATES OF AMERICA,
Territory of Dakota, } *ss*:

In the Supreme Court. May Term, 1884.

MOSES PIERCE, GEORGE BERGHOFFER, JAMES MCALEER, MARY A. BOGLE, Plaintiffs' & Respondents,
vs.
PHILANDER E. SPARKS and FRANK M. ALLEN, Copartners as Sparks and Allen, Defendants' & Appellants. } No. 158.

Appeal from the district court of Lawrence county.

This action coming on to be heard at the May, A. D. 1884, term of said supreme court at the supreme court-room, in the city of Yankton, D. T.; present, A. J. Edgerton, chief justice, and S. A. Hudson, Wm. E. Church, and C. S. Palmer, associate justices; and the appeal herein having been argued by Albert Allen, Esq., for the appellants, and by Mss. Van Cise & Wilson for the respondents, and the court having advised thereon, it is now here considered, ordered, and adjudged that the judgment of the said district court within and for said Lawrence county, appealed from herein, be, and the same is hereby, affirmed; and it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law and the judgment of this court.

And it is further considered and adjudged that respondents have and recover of the appellants his costs and disbursements on this appeal expended; taxed and allowed at fifty-nine dollars and seventy cents.

By the court: A. J. EDGERTON,
Chief Justice Supreme Court, D. T.

Church and Hudson, A. J., for affirmance.

Edgerton, C. J., dissenting.

Judge Palmer not being present at the arguments, took no part in the decision.

[Endorsed:] In supreme court, Territory of Dakota. May term, 1884. Moses Pierce *et al.*, resp'd'ts, *vs.* Philander E. Sparks *et al.*, appellants. Filed this 23d day of May, 1884. B. S. Williams, clerk.

43 MOSES PIERCE, GEORGE BERGHOFFER, JAMES MCALEER, and MARY A. BOGLE, Plaintiffs and Respondents,

vs.

PHILANDER E. SPARKS and FRANK M. ALLEN, Defendants and Appellants.

To the Honorable the Supreme Court of the United States:

The appeal of Philander E. Sparks and Frank M. Allen, the above-named defendants and appellants, respectfully showeth: That upon the 15th day of April, 1882, the above-named plaintiffs brought their action in the district court of Lawrence. county, Dakota Territory, against the above-named defendants and appellants, wherein they sought to recover the possession of certain real property, in their complaint described, together with damages for the withholding thereof.

44 The said defendants therein answered, as by the procedure of said Territory they might, alleging that they were the equitable owners of said property; that the plaintiffs were the holders of the legal title, which was held by them contrary to equity and good conscience, and charging them, said plaintiffs as trustees, and praying that they be decreed to convey such legal title to said defendants. Afterwards, in said court, the plaintiff- demurred to said defendants' answer, and such proceedings were had that on the 21st day of September, 1883, a final judgment was made and pronounced in the cause in said district court, wherein it was in substance adjudged that the plaintiffs were the owners of and entitled to the possession of the said premises, and that said plaintiffs have and recover of said defendants the possession thereof, with damages and costs. That afterwards an appeal was taken and perfected in said cause from the said judgment of the said district court (said cause having been tried and determined without a jury) to the supreme court of Dakota Territory.

45 That on the 23d day of May, 1884, a final decision and judgment was pronounced and rendered in said action by the said supreme court, wherein the said judgment of the said district court of Lawrence county was in all things affirmed with costs.

Wherefore these appellants appeal from the whole of said judgment of the said supreme court of Dakota Territory, and respectfully pray that the judgment of the said supreme court, and all the transcript and record and proceedings in the said action may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear and determine said cause, and that the said judgment of the supreme court of the Territory and of the said district court, and every part thereof, and of each thereof, may be reversed, and a trial and hearing awarded said defendants in said district court; and that they have costs, as such other judgment and decree as to the said Supreme Court of the United States shall seem just.

Dated Yankton, Dakota Territory, May 23d, 1884.

G. C. MOODY,
Attorney and Counsellor for Defendants and Appellants.

46 The foregoing appeal allowed, this 23d day of May, 1884, in open court.

By the court: A. J. EDGERTON, *Chief Justice.*

[Endorsed:] In supreme court. May term, 1884. Moses Pierce *et al.*, plaintiffs and respondents, *vs.* Philander E. Sparks and Frank M. Allen. Filed May 23d, 1884. B. S. Williams, clerk. Appeal.

47 TERRITORY OF DAKOTA, *ss:*

In Supreme Court of said Territory.

MOSES PIERCE, GEORGE BERGHOFFER, JAMES MCALEER, and MARY BOGLE, Plaintiffs and Respondents,

versus

PHILANDER E. SPARKS and FRANK M. ALLEN, Defendants and Appellants.

Here comes G. C. Moody, counsel for the above-named defendants, Philander E. Sparks and Frank M. Allen, and pray this honorable court that an appeal to the Supreme Court of the United States from the decision and judgment of the supreme court, now sitting, rendered in the above-entitled cause on the 23d day of May, A. D. 1884, be allowed said Philander E. Sparks and Frank M. Allen, defendants, and that the security provided by law be fixed, and the bond and undertaking therefor, together with the sureties, be authorized to be approved by the chief justice of the supreme court of said Territory.

Dated May 23d, 1884.

G. C. MOODY,
Counsel for Defendants, Philander E. Sparks and Frank M. Allen.

And now, May 23d, 1884, the above petition being presented in open court and considered, it is by the court ordered, that the
48 said appeal be, and the same is hereby, allowed, and the bond to operate as a supersedeas, and for costs, be fixed at five hundred dollars, with surety to be approved by the chief justice of this court.

By the court: A. J. EDGERTON,
Chief Justice.

[Endorsed:] In supreme court. May term, 1884. Moses Pierce *et al.*, plaintiffs and respondents, *vs.* Philander E. Sparks and

Frank M. Allen, defendants and appellants. Filed May 23d, 1884. B. S. Williams, clerk. Allowance of appeal.

49 *Assignment of Errors.*

Moses Pierce *et al.*, Plaintiffs and Appellees,
vs.
Philander E. Sparks *et al.*, Defendants and Appellants.

And the appellants herein say there is manifest error on the face of the record in this:

The supreme court of the Territory erred in affirming the judgment of the district court, which district court had erred in sustaining the demurrer of the plaintiffs to the first defense and counter-claim set up in defendants' answer, and in giving judgment therein in favor of the said plaintiffs and against said defendants.

Second. Because the said district court had also erred in sustaining the demurrer of the plaintiffs to the second defense and the counter-claim in defendants' answer, and in giving judgment therein in favor of said plaintiffs and against said defendants.

To each of which said rulings and decisions defendants had duly excepted.

Wherefore appellants pray that the said judgment herein rendered by the said supreme court of the Territory of Dakota, and by said district court, may by this Supreme Court be reversed, and these appellants restored to all things which they have lost by reason of such errors and said judgment. 50

G. C. MOODY,
Counsel for Defendants and Appellants.

[Endorsed:] In supreme court. May term, 1884. Moses Pierce *et. al.*, plaintiffs and appellees, *vs.* Philander E. Sparks *et al.*, defendants and appellants. Filed May 23d 1884. B. S. Williams, clerk. Assignment of errors.

51 Territory of Dakota:

In Supreme Court of said Territory.

Moses Pierce, George Berghoffer, James McAleer, and Mary Bogle, Plaintiffs and Respondents,
versus
Philander E. Sparks and Frank M. Allen, Defendants and Appellants.

And now, on this 23d day of May, 1884, comes G. C. Moody, one of the attorneys for the above-named defendants, Philander E. Sparks and Frank M. Allen, and it appearing that the said defendants have prayed an appeal to the Supreme Court of the United States from the judgment of this court herein, which appeal has been allowed, it is by the court ordered that the proceedings in this action be stayed for the period of ninety days from this date, to enable said defendants to perfect their said appeal, except the clerk is authorized to tax and insert in the judgment of affirmance the costs of the appeal to this court.

By the court: A. J. EDGERTON,
Chief Justice.

[Endorsed :] In supreme court. May term, 1884. Moses Pierce *et al.*, plaintiffs & respondents, *vs.* Philander E. Sparks *et al.*, defendants & appellants. Order of staying proceedings. Filed May 23d, 1884. B. S. Williams, clerk.

52 & 53 TERRITORY OF DAKOTA, *County of Lawrence:*

Philander E. Sparks and Frank M. Allen, being each duly severally sworn, say: That they are residents of Lawrence county, in said Territory, and are the parties named in a certain action lately pending in the supreme court of the Territory of Dakota, in which Moses Pierce, George Berghoffer, and James McAlleer and Mary A. Bogle were plaintiffs and respondents and said Philander E. Sparks and Frank M. Allen were defendants and appellants, wherein, at the May term of said court, A. D. 1884, the judgment of the district court was affirmed; that said judgment so affirmed was recovered by the said Moses Pierce, George Berghoffer, James McAleer, and Mary A. Bogle against said Philander E. Sparks and Frank M. Allen in the district court for Lawrence county, Dakota Territory, on the 21st day of September, A. D. 1883, for the recovery of the possession of certain real property in said plaintiffs' complaint mentioned and described, and the said judgment is now in full force and wholly unsatisfied, and that the value and amount of real property and matter in dispute in said action, exclusive of costs, at the time of the rendition of said judgment in said district and supreme courts, and at the present time, exceeds one thousand dollars, and covers the whole of said real estate and
54 property affected by said judgment so affirmed as aforesaid.

PHILANDER E. SPARKS.
FRANK M. ALLEN.

TERRITORY OF DAKOTA, }
County of Lawrence, } *ss:*

I, A. R. Z. Dawson, clerk of the first judicial district court within and for the Territory of Dakota, do hereby certify that the above-named Philander E. Sparks came before me at said county, subscribed to the foregoing affidavit in my presence, and was by me duly sworn thereto, this 20th day of June, A. D. 1884.

Witness my hand & the seal of said court, this 20th day of June, A. D. 1884.

[SEAL.] A. R. Z. DAWSON, *Clerk.*

TERRITORY OF DAKOTA, }
County of Lawrence, } *ss:*

I, J. C. Shurtz, a notary public within and for said county & Territory, do hereby certify that on this 21st day of June, 1884, before me came the above-named Frank M. Allen, & subscribed to the foregoing affidavit in my presence, & was by me duly sworn thereto according to law.

Witness my hand & notarial seal, this 21st day of June, A. D. 1884.

J. C. SHURTZ,
Notary Public.

[Endorsed:] In Supreme Court of United States. Moses Pierce *et al. vs.* Philander E. Sparks *et al.* Proof of value of property in controversy. Filed July 10th, 1884. B. S. Williams, clerk.

55 In the Supreme Court of Dakota.

MOSES PIERCE *et al.*, Respondents,
v.
PHILANDER E. SPARKS *et al.*, Appellants.

It is hereby stipulated and agreed that the clerk may tax and insert in the judgment of affirmance, in this action in the Supreme Court, the sum of thirty-one and $\frac{50}{100}$ dollars, expense of printing respondents' brief, together with such of the clerk's fees as remain unpaid, and the costs now allowed by statute of 1883, to wit, before argument, five dollars; for argument, fifteen dollars.

Deadwood, Dakota, June 20, 1884.

VAN CISE, WILSON,
Att'ys for Respondents.
G. C. MOODY,
Att'y for Appellants.

[Endorsed:] In supreme court, Dakota Territory. Moses Pierce *et al. vs.* Philander E. Sparks *et al.* Stipulation to tax costs. Filed July 10, 1884. B. S. Williams, clerk.

56 Supreme Court of the United States.

MOSES PIERCE, GEORGE BERGHOFFER, JAMES MCALEER, & MARY BOGLE, Appellees,
v.
PHILANDER E. SPARKS and FRANK M. ALLEN, Appellants.

Know all men by these presents, that we, Philander E. Sparks, Frank M. Allen, Edward D. Shannon, & Lucius C. Miller, of Lawrence county, Dakota Territory, are held and firmly bound unto Moses Pierce, George Berghoffer, James McAleer, and Mary Bogle, in the sum of five hundred dollars, to be paid to the said Moses Pierce, George Berghoffer, James McAleer, and Mary Bogle, their executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, dated this twentieth day of June, 1884.

Whereas the above-named Philander E. Sparks and Frank M. Allen hath prosecuted an appeal to the Supreme Court of the United

States to reverse the judgment rendered in the above-entitled
57 action by the district court of Lawrence county, Dakota Territory, which judgment was affirmed by the supreme court of said Territory:

Now, therefore, the condition of this obligation is such, that if the above-named Philander E. Sparks & Frank M. Allen shall prosecute their said appeal to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

PHILANDER E. SPARKS. [SEAL.]
FRANK M. ALLEN. [SEAL.]
EDWARD SHANNON. [SEAL.]
LUCIUS C. MILLER. [SEAL.]

Sealed and delivered in the presence of—
FRANK G. WASZABAUGH.

TERRITORY OF DAKOTA, }
County of Lawrence, } *ss:*

I, J. C. Shurts, a notary public within and for said county & Territory, do certify that this 21st day of June, 1884, before me came the above-named Philander E. Sparks & Frank M. Allen, to me well known to be the identical persons who are described in and who executed the foregoing instrument, & each severally duly acknowledged the execution of the same for their act and deed for the use and purposes therein expressed.

58 In witness whereof, I have hereunto set my hand & notarial seal, the day and year aforesaid.

[SEAL.] J. C. SHURTS,
Notary Public.

TERRITORY OF DAKOTA, }
County of Lawrence, } *ss:*

I, Frank J. Waszabaugh, a notary public within [and] for said county and Territory, do hereby certify that on this 24th day of June, A. D. 1884, before me came the above-named Edward D. Shannon and Lucius C. Miller, to me well known to be the identical persons who are described in & who executed the foregoing instrument, and each severally duly acknowledged the execution of the same for their and each of their act and deed, for the uses & purposes therein expressed.

In witness whereof, I have hereunto set my hand & notarial seal, the day and year last above written.

[SEAL.] FRANK J. WASZABAUGH,
Notary Public.

UNITED STATES OF AMERICA, }
Territory of Dakota, County of Lawrence, } *ss:*

Edward D. Shannon and Lucius C. Miller, being each duly
59 sworn, depose and say, and each for himself saith: That he is a resident and freeholder of Lawrence county, said Territory;

that he is worth the sum of one thousand dollars over and above all his just debts and liabilities in property situated in said Lawrence county not exempt from execution.

EDWARD D. SHANNON.
LUCIUS C. MILLER.

Subscribed and sworn to before me, this 24th day of June, A. D. 1884. Witness my hand and notarial seal, at Deadwood, D. T.

[SEAL.] FRANK J. WASZBAUGH,
Notary Public, D. T.

I approve the above bond and the sufficiency of the sureties thereto.

Dated Yankton, Dakota Territory, this 10th day of July, A. D. 1884.

A. J. EDGERTON,
Chief Justice Supreme Court, Dakota Territory.

[Endorsed:] In Supreme Court of United States. Moses Pierce *et al. vs.* Philander E. Sparks *et al.* Supersedeas bond. Filed July 10th, 1884. B. S. Williams, clerk.

60 By the Honorable Alonzo J. Edgerton, chief justice of the supreme court of Dakota Territory, to Moses Pierce, George Berghoffer, James McAleer, and Mary Boyle, plaintiffs:

Whereas Philander E. Sparks and Frank M. Allen have lately appealed to the Supreme Court of the United States from a judgment of affirmance of a judgment lately rendered in the district court of Lawrence county, in said Territory, in favor of you, the said Moses Pierce, George Berghoffer, James McAleer, and Mary Boyle, against them, the said Philander E. Sparks and Frank M. Allen, in an action tried and determined without a jury, and have filed the security required by law.

You are therefore hereby cited to appear before the said Supreme Court of the United States, at the city of Washington, on the first day of the next succeeding term of said court, to wit, on the 13th day of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Yankton, in the Territory of Dakota, on the 10th day of July, in the year of our Lord one thousand [eight hundred] and eighty-four.

A. J. EDGERTON,
Chief Justice of Supreme Court of Dakota Territory.

[Endorsed:] In supreme court. May term, 1884. Moses Pierce *et al.*, pl'ffs & respondents, *vs.* Philander E. Sparks *et al.*, def'ts & appellants. Filed July 10th, 1884. B. S. Williams, clerk.

61 UNITED STATES OF AMERICA, }
Territory of Dakota, } *ss:*

I, B. S. Williams, clerk of the supreme court of the Territory of Dakota, do hereby certify that the writings annexed to this certificate are true copies of their respective originals on file and remaining of record in my office, and that they constitute a full, true, correct, and complete transcript and copy of the record in the foregoing cause, as the same now remains of record in my said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of Yankton, in the Territory of Dakota, this 21st day of August, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the said United States the one hundred and ninth.

[SEAL.] B. S. WILLIAMS, *Clerk.*

62 In Supreme Court of Dakota.

MOSES PIERCE *et al.* *v.* PHILANDER E. SPARKS *et al.*

We hereby admit service of citation and appeal to the Supreme Court of the United States in the above-entitled action, this 16th day of July, 1884.

VAN CISE & WILSON,
Att'ys for Pl'ffs & Resp'd'ts.

63 In the Supreme Court of the United States.

MOSES PEIRCE *et al.*, Apppellee-,
vs.
PHILANDER E. SPARKS *et al.*, Appellant-.

TERRITORY OF DAKOTA,
First Judicial District, County of Lawrence, } *ss:*

G. C. Moody, being first duly sworn says: That on the 16th day of July, 1884, at Deadwood, in said county and district, he served on the above-named appellees a copy of the appeal and a copy of the citation filed in this cause with the clerk of the supreme court in and for the Territory of Dakota, by delivering said copy of the appeal and citation to Edwin Van Cise, of Van Cise & Wilson, personally, the attorneys for the said appellees, who signed the annexed admission of service.

G. C. MOODY.

Subscribed and sworn to before me, this 16th day of July, A. D. 1884.

[SEAL.] S. M. HOUGHTON,
Notary Public.

64 [Endorsed:] In the supreme court of Dakota Territory. Moses Pierce *et al.* *vs.* Philander E. Sparks *et al.* Affidavit of service of copy of appeal and citation.

Endorsed on cover: Dakota Ter'ty supreme court. No. 912. Philander E. Sparks and Frank M. Allen, appellants, *vs.* Moses Pierce, George Berghoffer, James McAleer, and Mary Boyle. Filed 5th September, 1884.

115-408

115-408

Demurrer.

In District Court, First Judicial District of Dakota Territory, in and for Lawrence County.

Moses Pierce *et al.*
vs.
Philander E. Sparks *et al.*
} Demurrer.

The plaintiffs demur to the first defense and counter-claim of defendants upon the ground—

That the same does not state facts sufficient to constitute a defense to this action or a counter-claim in defendants' favor against plaintiffs.

Plaintiffs also demur to the second defense and counter-claim of defendants upon the ground—

That the same does not state facts sufficient to constitute a defense to this action or a counter-claim in defendants' favor against plaintiffs.

VAN CISE & WILSON,
Attorneys for Plaintiffs.

In the Supreme Court of the United States. October Term, 1885.

Philander E. Sparks *et al.*, Appellants,
vs.
Moses Pierce *et al.*
} No. 563.

It is hereby stipulated and agreed by and between the above-named parties, through their counsel, that the foregoing and annexed demurrer constitutes a part of the record in the above-entitled cause, and was omitted therefrom as forwarded to the clerk of the Supreme Court of the United States, through a clerical error; and that it may be by the said clerk inserted in and made a part of the record in said case, in its proper place, immediately following the defendants' and appellants' answer, and printed as a part of the transcript, with the same force and effect as though it had been transmitted by the clerk of the supreme court of the Territory with the rest of the transcript.

Dated August 24th, 1885.

G. C. MOODY,
Counsel for Appellants.
VAN CISE & WILSON,
J. W. SMITH,
Counsel for Appellees.

[Endorsed:] Supreme Court U. S. October term, 1885. No. 563. Philander E. Sparks *et al.*, app'ts, *vs.* Moses Pierce & *al.* Stipulation of counsel & addition to record. Office Supreme Court U. S. Filed Sep. 2, 1885. James H. McKenney, clerk.

Office Supreme Court U. S.
FILED.
OCT 7 1885
JAMES H. McKENNEY,
CLERK.

115-408

ARGUMENT OF APPELLANT'S COUNSEL.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 563.

PHILANDER E. SPARKS, AND FRANK M. ALLEN, *Appellants*,

vs.

MOSES PIERCE, GEORGE BERGHOFFER, JAMES McALEER, AND
MARY A. BOGLE, *Appellees*.

G. C. MOODY, *Counsel for Appellants*,

VAN CISE & WILSON, J. W. SMITH, *Counsel for Appellees*.

IN THE SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1885.

No 563.

Philander E. Sparks, and Frank M. Allen, *Appellants,*

vs.

Moses Pierce, George Berghoffer, James McAleer, and Mary A. Bogle, *Appellees.*

APPEAL FROM DAKOTA TERRITORY.

G. C. Moody, *Counsel for Appellants.*
Van Cise & Wilson, J. A. Smith, *Counsel for Appellees.*

APPELLANTS' ARGUMENT.

This, and No. 564, are test cases from a large number now pending in the lower courts, involving the respective rights of townsite and mineral claimants upon the public mineral lands of the United States, in Central City, and Deadwood, Dakota.

The two cases may well be considered by the Court together, but the same counsel not being employed for the Appellees in both cases, and there being some difference of opinion among the counsel as to the questions involved, we are unable to submit the arguments together, though necessarily, in order to prevent repetition, I shall refer from one to the other, and furnish both counsel with my arguments.

The decisions of the Land Department have not always been uniform upon the questions here presented, nor am I aware of any decisions of this Court which directly touch upon the very question at issue in these cases.

Two principal questions are involved.—

FIRST:—Are the public unoccupied mineral lands of the United States of that character of lands which, under any circumstances, will admit of their occupancy and appropriation as town-sites, and can title thereto be legally acquired under the town-site acts of Congress?

SECOND:—Do the Betterment Acts of the States and Territories, as such acts are recognized and affirmed by Congressional enactment, apply to such lands?

Upon the first question, as I have said, the decisions of the Land Department have not been uniform.

As I understand those decisions, the Department originally allowed the town-site settlers to acquire title to such lands, subject to the right to mine and extract the precious metals therefrom. Subsequently, and during the time of the pendency of the controversies in these cases, the Department held, and so decided in these cases, that under no circumstances were mineral lands subject to entry as townsites. Still later, which is now the rule, the original decisions were, and are, adhered to, and the rights of the town-site settlers again recognized.

The questions in these cases are raised by demurrers to the answers.

The action was commenced as an action of ejectment with damages. The Code of Practice of Dakota authorizes, in such actions, answers in the nature of equitable defenses, and permits a party, by way of counter-claim, to allege facts which will entitle him, in the same action, to affirmative equitable, as well as legal, relief.

The appellees, in their complaint, in substance allege: That on the 11th of December, 1878, they were the owners, seized in fee, and lawfully possessed of certain placer mining ground situated in Lawrence county, Dakota Territory, deriving their title thereto from an entry and purchase thereof from the United States Government, November 30th, 1877, which entry was subsequently confirmed by patent of date March 22, 1880. They then allege an entry and ouster by the appellants, and a continued withholding.

The appellants, in their answer, allege that on the 28th of February, 1877, the premises described in the complaint, together with other lands contiguous thereto, were lawfully selected, appropriated, located, used and occupied for and as a townsite, and for town-site purposes, and as such were laid out into lots, blocks, streets and alleys, and known and designated as Central City; that such town was thus located upon the unappropriated lands of the United States; that at that time it contained a population of about one hundred inhabitants, and thenceforth grew with great rapidity until, on the 22d of March, 1880, the date of appellees' patent, it was an important town, containing about two thousand inhabitants; that on the said 28th of February, 1877, the grantor of the appellants was in possession of the disputed ground as a town-site lot, and that it has been ever since so occupied by him and his successors in interest, these appellants.

The answer further alleges that, long after this property and the lands adjacent had been selected, and while they were being used for the purposes of business and trade exclusively, the appellees made claim to the ground in controversy, and had it surveyed as a placer claim, and made application for a patent thereto under the mineral land laws; that to such application the inhabitants of said town protested at the proper local land office, alleging their prior appropriation as town-site occupants, and such proceedings were thereafter had that on the 22nd of April, 1878, the Commissioner of the General Land Office directed that patent issue to the mineral claimants, with the exception or reservation saving and reserving from the grant all town property rights upon the surface, and all lots, blocks, streets and alleys, and all houses, buildings and improvements thereon not belonging to the placer claimants, and all rights necessary and proper to occupation and enjoyment of the same in accordance with the long established and settled practice of the Land Department in such cases.

That thereafter, on November 7th, 1878, and without any appeal having been taken from said decision, the Commissioner made an order suspending said entry, and ordered that a hearing be had before the officers of said local land office, to determine the date when said land was first occupied as a town, the character and extent of such occupancy, and the improvements thereon, and whether the land was mineral or non-mineral in character, which hearing was commenced before said local officers on the 26th of November, 1878; that upon such hearing both parties submitted their testimony, after which, on the 20th day of January, 1879, said local officers decided, in substance, that the said land was valuable for minerals, but had been appropriated for town-site purposes prior to any appropriation by the appellees, and that the land should be awarded to the occupants of said Central City town-site, including the appellants, subject to the right of the appellees to mine and extract the gold therefrom, if in so doing, they did not materially interfere with the possession, buildings and improvements of said town occupants, including the appellants; that both the said town-occupants and the said appellees were satisfied with said decision, and no appeal was taken therefrom by either party.

On the contrary, an appeal therefrom was especially waived by both parties; that thereafter, in the absence of any appeal, and notwithstanding said waiver, and on the 6th of October, 1879, the said commissioner reviewed said decision, and decided that said town-site claimants and occupants, including these appellants, had no right whatever to the land, upon the sole ground that it was mineral, and therefore not subject to appropriation except under the mineral law of 1872, and that the said lot of the appellants, with their improvements, was the property of the appellees.

That at said hearing before the local office, and in the review by the Commissioner there was no dispute as to the fact that the said town-site claimants and occupants were the first appropriators of the land, and that appellants, and those through whom they claim had acquired an interest in, and occupied and used the premises in controversy in this case for the purposes of a town-site, prior to any appropriation upon the part of the appellees.

Yet, notwithstanding these undisputed facts, the said commissioner decided that the fact of such prior appropriation as aforesaid gave no rights to the inhabitants or occupants of said town-site, including the appellants.

That said decision was based upon the sole ground that the the land was mineral in character, and therefore no recognition or protection could be afforded under any law to the rights or claims of said town-site occupants, including these appellants, in or to the said lots or improvements thereon, or any part thereof, but that they were the property of the appellees, the placer mining claimants, as aforesaid.

Whereupon said Commissioner immediately dismissed said protest and wrongfully and illegally directed a patent to issue to tion or reservation therein to protect the possession and improvements of the appellants and their grantors, or any of said town occupants, which patent was thereafter, on March 22d, 1880, issued accordingly.

And appellants. offering to pay their proportion of the legal expenses in procuring the patent from the United States, demand that, as to said disputed property, the appellees shall be declared their trustees, and compelled to convey the title which they have thus wrongfully acquired.

As a further defense and counter claim, the appellants, in their answer, set up further facts to entitle them to the benefit of the Local Betterment act, alleging the making of permanent improvements on said lot by them and by the person under whom they claim, while they were holding under color of title adversely to the claim of the plaintiff in good faith, and demanding, in case the title shall not come to them, that they be allowed the value of such improvements.

The Betterment act of this Territory contains these provisions:

Sec. 641 of the Code of Civil Proceedure, and following: "In "an action for the recovery of real property, upon which permanent improvements have been made by the defendant, or those "under whom he claims, holding under color of title adversely "to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a counter-claim by such defendant.

"The counter-claim in such action must set forth, among other "things, the value of the land aside from the improvements "thereon, and also, as accurately as practicable, the improvements "upon the land, and the value thereof. Issues may be joined and "tried as in other actions, and the value of the land, aside from "the value of the improvements thereon, and the separate value "of the improvements must be specifically found by the verdict "of the Jury, the report of the Referee, or the finding of the "Court. The judgment of the court upon such finding, if in "favor of the plaintiff, for the recovery of the real property, and "in favor of the defendant for the counter-claim, shall require "such defendant to pay to the plaintiff the value of the land, as "determined by such finding, and the damages, if any, recovered "for withholding the same, and for waste committed upon such "land by the defendant, within sixty days from the rendition of "such judgment, and in default of such payment by the defendant, that the plaintiff shall pay to the defendant the value of "the improvements, as determined by such finding, less the "amount of any damages so recovered by plaintiff for withholding the property, and for any waste committed upon such "land by the defendant, and until such payment, or tender and "deposit in the office of the Clerk of the Court in which such "action is pending, no execution, or other process shall issue in "such action to dispossess such defendant, his heirs, or assigns."

I quote in this connection the Act of Congress of June 1st 1874, 18 U. S. Statutes at Large, page 50, entitled: "An act for "the benefit of occupying Claimants."—

"Be it enacted, etc., That when an occupant of land, having "color of title, in good faith has made valuable improvements "thereon, and is, in the proper action, found not to be the rightful owner thereof, such occupant shall be entitled in the Federal "Courts to all the rights and remedies, and, upon instituting the "proper proceedings, to such relief as may be given or secured to "him by the Statute of the State or Territory where the land lies, "although the title of the plaintiff in the action may have been "granted by the United States after said improvements were so "made."

I will first ask consideration of the questions involved in the first counter-claim in the answer.

It seems to the Appellants that the proposition is nakedly and squarely presented.

Can the public, unoccupied mineral lands be appropriated for town-site purposes, and a title thereto be acquired under the laws of Congress, relating to town-sites upon public lands? If so, then it seems clear that a case is presented by this answer, entitling these Appellants and others like situated. to maintain their possession, and occupancy as town-site claimants.

Priority of legal appropriation is the recognized rule governing the acquirement of title to the public lands under the mineral, the town-site, the homestead, and the pre-emption laws. That these Appellants, and their grantors, were the prior appropriators is admitted by the demurrer.

If they could legally appropriate this land for town-site purposes, they have done so.

These lands have been selected, used, occupied and appropriated for town-site purposes long prior to any inception of title by the mineral locators. The town-site occupants have done all within their power which could reasonably be asked of them, to indicate such appropriation.

There can be nothing in the argument worthy of consideration, that the Judge of probate—who, in this territory. is the County Judge—did not proceed to make entry, or to take steps in that direction. The law of Congress does not limit the time within which application to enter shall be made by the County Judge up to the time when the land is offered for sale. If the occupants choose to rely upon their possessory rights, they are as fully protected in the right of possession by the law as though they had a patent title, at least until the local rules and regulations create a limitatation.

In this instance the action and decision of the Land Department absolutely precluded any act by the Probate Judge toward acquiring a title on behalf of, and as trustee for, the occupants when the Department decided that these lands were not subject to entry as town-sites, but only under the mineral land laws, without any reservation. So far as the Probate Judge was concerned that was the end of it; and when the patent title was issued to the claimant under the mineral land laws, if the occupants were entitled to have the title come to them through the Probate Judge, they were also entitled to a conveyance from the party who had illegally thrust himself in the way, and obtained the title in himself.

The Sections upon this Subject are Nos. 2387 and 2388 of the U. S. Revised Statutes. They are as follows:—

"Whenever any portion of the public lands have been, or "may be settled upon, and occupied as a townsite, not subject to "entry under the Agricultural Pre-emption laws, it is lawful, in "case said town be incorporated, for the corporate authorities "thereof, and if not incorporated, for the Judge of the County "Court, for the County in which such town is situated, to enter at "the proper Land Office, and at the mininum price, the lands so "settled and occupied, in trust for the several use and benefit of "the occupants thereof, according to their respective interests; the "execution of which trust, as to the disposal of the lots in such "town and the proceeds of the sale thereof, to be conducted under "such regulations as may be prescribed by the legislative author-"ity of the State or Territory in which the same may be situ-"ated."

Sec. 2388:—"The entry of the land provided for in the pre-"ceding section, shall be made, or a declaratory statement of the "purpose of the inhabitants to enter it as a town-site shall be "filed with the Register of the proper Land Office prior to the "commencement of the public sale of the body of land in which "it is included; and the entry, or declaratory statement, shall in-"clude only such land as is actually occupied by the town, and the "title to which is in the United States. * * * * *

The only limit in point of time seems to be that such entry, or a declaratory statement of the purpose, shall be made or filed at any time prior to the commencement of the public sale of the body of land in which the town-site is situated.

The facts plead show a decision favorable to the town-site occupants in the first instance, a reversal without appeal, a hearing solely with reference to the mineral character of the land, a decision that the character of the land was such that no application to enter it as a town-site would or could be entertained though there were no adverse claimants; therefore an application to enter by the Probate Judge would have been futile.

It seems to the appellants also that the same facts are a perfect answer to the proposition, if one shall be urged, that no adverse proceedings and action in court were had to determine the rights of the parties, for the very course taken by the Land Department precluded such proceedings to be had.

Beside, the appellants submit that there is no provision of law by which a controversy such as this is, between prior townsite occupants and subsequent mineral claimants can be determined in the courts in the first instance, or until the proceedings shall have run through the department having jurisdiction over the government lands, and a decision by such department, after all the facts are admitted, contrary to law, or obtained through some fraud entering into the proceedings such as will justify the interposition of a Court of Equity.

Section 2326 of the U. S. Revised Statutes contemplate only a controversy between two persons claiming the same land under the same right, to-wit, under the mineral land laws. All the machinery which that section affords, its terms, and the judgment which it provides for, unmistakably limit those proceedings to such cases.

For instance:—Among the provisions contained in that section are these:—

"After such judgment shall have been rendered," (that is, the judgment upon the right of possession,) "the party entitled to "the possession of the claim, or any portion thereof, may, without "giving further notice, file a certified copy of the judgment roll "with the Register of the Land Office, together with the certificate "of the Surveyor General that the requisite amount of labor has "been expended or improvements made thereon, and the descrip-"tion required in other cases, and shall pay to the Receiver five "dollars per acre for his claim, together with the proper fees, "whereupon the whole proceedings and the judgment roll shall "be certified by the Register to the Commissioner of the General "Land Office, and a patent shall issue thereon for the claim, or "such portion thereof as the applicant shall appear, from the de-"cision of the court, to rightly possess."

The claim here spoken of is a mining claim. It is of mining claims that the section, and the chapter and the act is treating.

These proceedings subsequent to the judgment are proceedings proper and necessary to be taken in perfecting title to a mining claim. The price per acre fixed is for a quartz mining claim, and nothing of the kind is necessary or proper in town-site entries. The town-site act requires no amount of expenditures for improvements, provides for no mode of ascertaining their value. The Surveyor General has no act to perform regarding such improvements. The only question in such cases is, what is the number of inhabitants? And that number being ascertained, the law fixes the quantity of land within which limit an entry may be made.

Then, if we are right in our conclusion that no further steps were necessary by the town-site occupants under the circumstances, as plead in this case, to enable them to maintain their possession, and to subsequently acquire a title from the government, the proposition now before the court is simply whether it is possible, under any circumstances, to acquire title to mineral lands under the town-site act.

This leads us to an examination of the laws of Congress relating thereto. The Land Department has held in these cases that it was not possible. The decision of the Commissioner was that the lands, being mineral lands, notwithstanding the fact of the prior appropriation by the town-site claimants and occupants, as a conclusion of law, they must be awarded to the subsequent mineral claimants; and they were so awarded.

If that decision was right, the judgment in this case upon the first counter-claim is right, and should be affirmed. If it was erroneous, then this judgment should be reversed, and the appellees held to be trustees of the title for the appellants.

The history of the laws relating to the disposal of the public lands shows that so far as agricultural entries are concerned, Congress expressed a clear intent to reserve from such entries all lands which possessed the character of mineral lands, that is, all lands which were valuable for minerals

It has been undoubtedly the settled policy of the Government to reserve from all grants of land, either to private individuals, corporations or to public bodies and states, lands containing the valuable minerals, and until quite recently no provision for passing the title from the United States to such lands was made by any act of Congress. Whatever was done in the way of extracting the precious metals was done by the sufferance rather than the express permission of Congress.

During all the time since the passage of the first act relating to the establishment of town-sites upon the public lands, however, there has been manifested an intent on the part of Congress to permit such town-sites to be located as well upon the public mineral lands, as upon any other class of the unoccupied and unappropriated public lands.

We find that as early as March, 1863, the President was authorized to reserve from the public lands, whether surveyed or unsurveyed, town-sites on the shores of harbors, at the junction of rivers, important portages, or any natural or prospective centers of population. And from time to time provision was made for the disposition of such lands as were settled upon and used for town-site purposes.

By the Act approved March 3d, 1865, the establishment of town-sites upon what are known and called mineral lands, is clearly recognized. Section 2 of that Act relates to cities or towns existing on the public lands; it provides for fixing the price of lots in such town or city, and then in the concluding provisos there are found these words:

> "*Provided further* that where mineral veins are possessed, "which possession is recognized by the local authority, and to the "extent so possessed and recognized, the title to town-lots to be acquired shall be subject to such recognized possession, and the "necessary use thereof. *Provided*, however, that nothing contain"ed herein shall be so construed as to recognize any color of title "in possessor's for mining purposes as against the government of "the United States." 13 U. S. Stat. at Large, p. 529.

Now, it will be seen by that provision, that Congress must have had information of the existence of cities and towns upon the public mineral lands, and it is the vein within those mineral lands which is spoken of as being possessed and recognized by local authority and the title to the town lot to be acquired was to be subject to the locally recognized possession of such mineral vein, together with the necessary use thereof.

So it will be seen that before Congress made any provision for the disposition of the public mineral lands, it recognized the existence by necessity of towns and cities in the mining country wherein the Government still retained the title, and the title to the mines which were then in the Government, would not pass, though disposing of the lands to Town occupants.

In the history of the Legislation upon the subject of obtaining title to Government lands through the machinery provided for a town-site settler, there seems to be but three clauses reserving from the operation of such town-site acts the mineral lands or the mines therein. One of these I have just quoted. That only excepts from the title acquired by the lot-owner, such *veins* as are in the possession of private individuals, and only the vein to the extent possessed and recognized by the local authority.

Another is found in the Act approved March 2nd, 1867, Volume 14, United States Statutes at Large, pape 541. That is an Act for the Relief of the Inhabitants of Cities and Towns upon the Public Lands. It provides the mode of making the entry of the lands, the price to be paid, and the area; excepts from its provisions military and other reservations heretofore made by the United States, and reservations for light-houses, custom-houses, mints, or for such other public purposes as the interests of the United States may require, and then provides furthur that no title shall be acquired under the provisions of this Act, to any mine of gold, silver, cinnibar, or copper.

This, no more than the preceding Acts, excepts from the provisions of such town-site laws the lands in which the precious metals may be found. A mine of gold, silver, cinnibar or copper, would not include the lands wherein such mine was situated, to any greater extent than was necessary for the extraction of those metals.

The confusion of the lands with the mines seems to have produced the difficulty with reference to this and other like cases. The existence of the mine, its development, and the extraction of the metals therefrom, are perfectly consistent with the existence of the town or city upon the lands wherein those mines are situated.

Such is the case, ordinarily, with both quartz and placer mines. It is well known, that, as a rule, that part of the placer claim which the miner operates and works is but a very limited extent. He follows what he calls his "pay streak,"—quite frequently never coming to the surface with his workings, except with his shaft or mouth of his drift, and it frequently occurs that it is just as convenient to work a placer claim upon which is situated many buildings and other improvements as it is to work a quartz claim under like circumstances. The gold is usually found on or near bed-rock. If that bed-rock is deep down below the surface he must work by means of underground workings to make it valuable in profits. If it is shallow, so that he can work it from the surface, then there is no difficulty, because the foundation of the improvements and superstructures would necessarily go to the bed-rock, and in his workings he need not necessarily injure or destroy any of such superstructures.

I am speaking of these things for the purpose of removing any impression which may be made by an assertion that it would be impossible for a town to be located upon public mineral lands without preventing the extraction of minerals therefrom.

Evidently, thus far, as we have seen, Congress contemplated the location of towns and cities upon the public lands which contain minerals. They have provided for the sale and transfer of such lands, but excluding from such sales and transfer, in the first place, all those veins of mineral which were in possession of other parties under local recognition, and in the second act excluding all veins or mines of gold, silver, cinnibar, or copper, whether in or out of possession of other parties.

The next provision to which I ask attention is found in Chapter 53 of the Act approved June 8th, 1868; volume 15 U. S. Statutes at Large, page 67. This section reads as follows:—

> "That the inhabitants of any town located on the public "land of the United States may avail themselves, if the town au-"thorities elect so to do, of the provisions of the Act of March 2d, "1867, entitled 'An Act for the Relief of the Inhabitants of Cities "and Towns Upon the Public Lands,' *Provided,* this Act shall not "prevent the issuance of patents to persons who have made, or "may make, entries, and elect to proceed under existing laws; "and *provided further* that no title under said Act of March 2d, "1867, shall be acquired to any valid mining claim or possession "held under the existing laws of Congress. *Provided also,* That in "addition to the minimum price of the lands included in any town-"site entered under the provisions of this Act, and the Act for "the Relief of the Inhabitants of Cities and Towns Upon the Pub-"lic Land, approved March 2d, 1867, there shall be paid by the "parties availing themselves of the provisions of said acts, all costs "of surveying and platting any such town-site, and the expenses "incident thereto incurred by the United States, before any patent "shall issue therefor."

It will be observed that this only excludes from the title which may be acquired under the town-site act, such valid mining claims or possessions as are held under existing laws.

Of course that is a continuing statute, and no doubt the proper interpretation of it is to say that it means such valid mining claims or possessions as may be held under existing laws in force at the time of the town-site selection.

This is the first instance, so far as appellants' counsel have been able to discover, where any exception or reservation of the mineral *lands* is made in any town-site act. Mines and veins are excluded by the other provisions to which attention has been directed, but in this instance it is evidently, of course, not only the *mine*, or the *vein*, but it is the *land* that is intended to be excluded.

But what land? Not the public unoccupied land, but a valid mining *claim or possession* held under existing laws. That is, such claims as have priority in point of time of appropriation to the selection and settlement of the town-site.

Rather than this being a reservation which would impliedly preclude town-site settlements upon the public mineral lands, it is a clear implication that Congress intended town-sites to be located upon mineral lands, excluding, by the adoption of the rule of prior appropriation, from selection for such purposes, the lands or claims which the miner holds under existing laws, having complied therewith, so as to entitle him to the right of possession.

I wish to direct the attention of the Court to the difference in the provisions for the sale by the government of the public lands between those which authorize their purchase under the preemption and homestead laws, and those which authorize their purchase under the town-site acts. And in this connection I may say that in all grants of the public land, and in all provisions authorizing their sale and purchase, except in the town-site acts, and in the mineral land laws themselves, either expressly or by necessary implication, and we may also say, by the settled policy of the Government, mineral lands are excluded.

Not so in the town-site acts. Congress seems to have recognized that necessarily large centers of population and business would accumulate in a mining country, and made no such unwise and unjust provisions of law as would put the business interests and business property at the mercy alone of the mineral claimant.

It was and is well known that, like the cases under consideration, which involve the town of Central City and the City of Deadwood,—localities within about two miles of each other,—that population and business would precede the possibility of obtaining titles under the mineral land laws.

The necessities of a mining population bring concentration of people; business must be conducted, structures for business must be erected, dwellings must be provided. Certainly if the law be such that only the miner may acquire title to mineral lands, and it can be acquired only under the mineral land laws, other people are trespassers. If centers of population can not lawfully exist in a mining country where all the lands are public lands, because no one can acquire the right of possession or the title except under the mineral land laws, then, I repeat, necessarily all but the miner and prospector are trespassers.

The miner is authorized to occupy and possess the mineral lands for a definite purpose:—to explore them and extract the minerals therefrom. The object and purpose of the privilege given to him of acquiring the title, and of retaining, under the local laws, the possession, is to extract the precious metals,—not to enable him to lay out his mining claim into lots, blocks, streets and alleys, and speculate upon the value of the surface right.

This case and the next one throw a lurid light upon the unjust effect which the construction of the Town-site Act contended for by the Appellees, would have. Here are large centers of population. As the records show, in both the towns, situated very close together, there were some six thousand population. Most of this population existed there, as the answers also show, before any claim to the ground was made as mineral, and presumably before any discovery of minerals in paying quantities was made,—at least within the limits of the land in controversy.

Such an aggregation of population had necessarily induced the erection of hundreds of houses and business blocks. Many thousands of dollars have been expended in structures for the purposes of business, trade and inhabitancy. The miner claims to have discovered some gold in the ground, claims the land under the mineral land laws, in form or in fact performs the acts necessary to make a location, proceeds under the mineral land law to obtain a title, and he, and the inhabitants of those towns are advised by this decision of the Department that all the buildings, the business blocks, the hotels, the public buildings, the dwellings, and improvements of all kinds and character, are, by virtue of the law, the property of this subsequent mining appropriator; and thus a mining claim, perhaps of trifling value, all the precious metals in which could be extracted in one season with the work daily of three men, is turned into wealth amounting to millions. Such cannot, it seems to us, be the construction which the courts will put upon this town-site act.

If it is urged that the construction contended for by the Appellees is in the interest of the Government, for the reason that agricultural lands may be purchased at the rate of a dollar and a quarter, an acre, while placer ground is sold at two dollars and a half per acre, and quartz ground at five dollars per acre, the answer to that is that the law is ample to exact from the town-site occupant more even than the highest price charged for mineral lands.

But let me now revert to the difference in the language of the Acts authorizing pre-emption and homestead settlements, and those relating to town-sites.

The pre-emption Act provides that the following classes of lands, unless otherwise especially provided for by law, shall not be subject to the right of pre-emption, to-wit:— * * * * Lands included within the limits of any incorporated town, or selected as the site of a city or town; lands actually settled and occupied for purposes of trade and business, and not for agriculture; *lands* on which are situated any known salines, or mines.

Thus for purposes of pre-emption, lands selected or settled upon for the purpose of trade and business, are put upon the same footing as lands in which are situated mines, and it is the *lands* in which are situated mines that are reserved from the operation of the pre-emption law.

Again: In the homestead law, the prohibition is, "Nor shall "any mineral *lands* be liable to entry and settlement" under its provisions.

Now, with reference to the selection and sale of town-sites on the public lands, as we have seen by the act heretofore quoted, of March, 1865, which is Section 2386 of the Revised Statutes, it is the mineral *veins*, where possessed under the recognition of local authority, and to the extent so possessed and recognized, that are excluded.

And again, by the Act of March 2, 1867, it is the mine of gold, silver, cinnibar or copper, that is excluded. By the Act of June 8, 1868, it is the valid mining claim or possession held under existing laws that is spoken of.

In other words, so far as the *claim* or *land* is concerned, it is that land which under the doctrine of prior valid appropriation, shall be secured to the prior appropriator, and not taken by the subsequent town-site claimant, and not any other *land*.

Is it not significant that, while under all the provisions of law for disposing of the public lands, whether by grant, or through the pre-emption or homestead laws, the lands in which are contained valuable minerals are excluded from their operation, while under the Town-site Acts it is only the *vein*, the *mine*, the precious metals, and such valid mining claims as exist by virtue of the law. In other words, in addition to the mine or vein are excluded only such *lands* as have been already appropriated.

As a further illustration, let us group all these acts which have come into the Revised Statutes as sections 2386 and 2392.

That which comes as section 2386, as I have before shown, is taken from chapter 107, volume 13, page 529 of the U. S. Statutes at Large. That act purported to be An Act Supplemental to an Act for the Disposal of Coal Lands and Town Property on the Public Domain, section 2 applying to cities and towns existing on the public lands. In that section the proviso reads that where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof. There is no other exclusion in that section.

The first statute from whence came the first clause in section 2392 is Chapter 177, Volume 14, page 541, U. S. Statutes at Large. That is An Act for the Relief of the Inhabitants of Cities and Towns upon the Public Lands, providing that whenever any portion of the public lands of the United States has been or shall be settled upon and occupied as a town-site, whether such selected and occupied lands are or are not surveyed, they may be entered; and the concluding proviso is this:—

> "And *Provided, further*, That no title shall be acquired under "the provisions of this act to any mine of gold, silver, cinnabar or "copper."

The concluding clause in section 2392 of the Revised Statutes is taken from Chapter 53, Volume 15, page 67, U. S. Statutes at Large, and extends the provisos of the former act of March 2, 1867, to the inhabitants of any town located upon the public lands of the United States, and amends that act regarding the subject now under consideration, by adding these words:—

> "*Provided, further*, That no title under said act of March 2, "1867, shall be acquired to any valid mining claim or possession "held under the existing laws of Congress."

If Congress intended to exclude cities and towns from the public mineral lands, why incorporate such a provision? If towns and cities can not be located, under the law, upon any mineral lands, whether such lands were claimed or unclaimed, would be unimportant.

Putting the proposition in another form:—These are all the provisions relating to the effect of the selection and location of cities and towns upon the public mineral lands. And if, as the judgment in this case affirms, mineral lands can not lawfully be located upon, the mineral lands unclaimed and mineral lands claimed would be both included.

At the time of the passage of that act in 1868, as well as that of 1867, the laws of Congress did recognize an appropriation, by qualified persons, and with a limit fixed either by Congress, or the local law, of the public lands by the prospector and the miner. The right of possession, so long as the appropriation was maintained by a compliance with the laws governing the possession, was recognized by Congressional law.

All mines were, by the former enactments, excluded from sale under the town-site acts, and this act of 1868 was evidently for the purpose of avoiding any question as to the right of the miner to maintain his possession against the town-site claimant when his possession was prior in point of time to that of the town-site claimant.

It is sometimes urged that the policy of the Government is against the sale of any mineral lands except under and by virtue of the mineral land laws, or where in express terms such sale is authorized.

Is that policy any more apparent than the one encouraging the settlement in aggregations of people upon the public lands? Is such a policy to be invoked when its operation would be so destructive to equity and good conscience, as it would be if successfully invoked in these cases?

If the rule is one of iron rigidity, as claimed and enforced in these cases, that under no circumstances could the title to mineral lands be acquired under the town-site laws, then we can well conceive of a case quite parallel with these under discussion, where a discovery of valuable deposits of gold and silver brings into proximity to such discoveries large centers of population, where cities are built by the inhabitants and by subsequent discovery of the existence of gold in the lands where the cities are built, the discoverer may be able, under such construction of the law, to gather to himself wealth almost beyond his comprehension, by the simple expenditure of labor in improving his claim to the extent of five hundred dollars, and the payment to the government of two dollars and a half an acre.

There is sound reason for excluding mineral lands from the operation of the homestead and pre-emption laws and like enactments. As a rule, such lands are totally unfit for agricultural purposes. Other reasons therefor I will not stop to suggest; but convenience and necessity frequently require the existence of towns and cities upon such lands.

When the precious metals that exist in the lands are reserved from the sale to the town-site claimant, with whatever facilities are necessary for their extraction, the policy of the Government, from whatever source derived, is fulfilled.

I am not urging any violation of the rights of the prior appropriator of public lands, with a view of taking advantage of the privilege to purchase. On the contrary, I am insisting upon the enforcement of that rule. The right to the precious metals, and to the possession of such portions of the lands in which they are enclosed as the law now recognizes as his necessity or convenience in extracting such precious metals, is conceded to be as perfect, but no more perfect, than the right of the town-site claimant to the possession of the lands and property situated thereon; and he who first makes a valid appropriation thereof,—that is, of the lands,—and is thus prior in point of time, is prior in point of right, and no other rule can with safety be adopted.

I concede that the town-site claimant takes his land without any right to the precious metals therein, and subject, under proper regulations, to have it extracted from the land which he thus acquires.

It being admitted in this case by the demurrer to the answer that these appellants were town-site occupants, that they were prior in time of appropriation, that they were lawfully there upon the public lands, and were in the actual and peaceable possession and occupancy thereof, they had thereby, so far as the lands are concerned, and the right of occupancy and possession, all that could be acquired, and with it the right thereafter to purchase and acquire the title.

If in their lot, which nowhere appears in the pleadings, there exists a mine of the valuable minerals, or any gold, silver, cinnabar or copper, they got no right to the possession of such mine, nor can they acquire any title to it, this is conceded.

But when the apppellees took the title to the land, simply because somewhere upon their surveyed claim, which included the actual possession of appellants, gold had been discovered, they took the title which the appellants had the right to acquire, and which they now in equity and good conscience are bound to convey, while this judgment which we are seeking to reverse holds that the later comer took not only the precious metals, but the land and the superstructures thereon, to the erection of which tney contributed nothing.

The adjudicated cases give us but little light upon this question. It is one dependent wholly upon the construction which shall be given to the town-site acts.

As has been seen, the Land Department has not been consistent in its views, and this Court is called upon to determine which of the decisions by that Department is the correct one.

The case of Steele vs. The Smelting Company, 106 U. S., 447, and cases there cited contain about all the law upon this subject with which the Courts have favored us.

The Appellants are not disposed, if they could, to question the soundness of these rules there having recognition and so clear announcement—indeed that case seems to us to recognize the lawful occupancy of the public mineral lands for town-sites, and when actually occupied for such purpose, and to the extent so occupied, that they are not open to exploration, location and sale. While not decided by the Court, because not in that case, the fact of occupancy seems there to be assumed as one which would preclude the location and sale for mining purposes.

We do not claim here that within the limits of a town-site on the public domain, the prospector may not go anywhere upon the unoccupied portion thereof, and if he discovers the precious metals therein, locate and purchase such unoccupied portion thereof under the mineral land laws, to the extent of the limit of a legal claim. We admit an equality in the right to occupy and purchase, under both the Mineral and Townsite Enactments, with no limit upon the mineral locator to take the metals, but with a condition upon the town-site claimant that he may not acquire title to any *vein* or *mine* therein. What we complain of in these Cases is that the miner has not only been permitted to acquire title to the unoccupied parts and the mines therein, but by virtue of his discovery therein, he has, in "one fell swoop" taken our occupied part, valuable improvements and all.

Please bear in mind that these Appellants were in the actual occupation of this lot, with business structures thereon, claiming the right of possession under the Town-site laws, months before the discovery of minerals therein, or the location as a mining claim. The ground is only claimed to be placer— no vein is pretended to exist there. It cannot be presumed that men went into our business houses, dwellings, hotels, yards, etc., or under them to search for gold. It does not so appear in these cases, but only in a sort of general way that "the lands were valuable for "minerals." This of course must have been based upon proof of exploration in the unoccupied portion of the town-site. By the decision of the Commissioner, the mining locator has taken not only the mine or vein if one existed, but the lands and the superstructures and all. Necessarily, to be consistent, the officers of the Land Department must have held as they did, that the lands which are valuable for minerals were not subject to lawful occupancy under the Town-site Acts, and these people, other than the prospectors, were all trespassers, and their expenditures could inure to the benefit of the first comer under the mineral land laws. The Appellants are unable to see that such a decision gains any support from Steele vs. The Smelting Company.

As before said, a quartz location may be six hundred feet in width and fifteen hundred feet in length, a placer location twenty acres in extent. It is notorious that veins in such quartz locations are usually quite narrow, occupying but an insignificant part, comparatively, of the claim, and seldom coming to the surface, except in occasional places. It is equally well known that usually in placer ground, the portion which the miner works, or his "pay streak" is quite limited and easily worked out without material injury to the superstructures on the surface. Now to hold that after a city is built on such land, the subsequent discoverer of a vein of quartz, or that the dirt on the placer contains some gold dust, may so claim and locate the surface as to *capture* the city and hold it as effectually as might the public enemy of the country wherein that city is situated, we submit gains no encouragement from any decision of this Court and we trust with confidence never will. Yet such was the effect of these—which we may term intermediate decisions—of the Land Department. Not now, fortunately for those appealing to that tribunal, the rule.

The case of Steele v. Smelting Co. differs from these casses under consideration in most of the essential features.

First, That was an action at law. This, at the stage of the proceedings where the rights of the parties were adjudicated, was in equity.

There can be no doubt of the conclusiveness of a patent regular upon its face in an action at law.

It is equally well settled that in equity a party showing himself entitled to the title which the patentee has by wrongfully intruding himself obtained from the Government, may charge such patentee as his trustee and compel him to convey. And a mistake in the law governing the duties of the Land Department, or imposition practiced upon it through the fraud of such patentee, will enable such Court of Equity to administer this justice.

Second. So far as the case is stated, it would seem that the defendants in that case only averred the prior occupancy by virtue of the existence of the town-site anterior to the mining location, and not actual prior occupation of the particular lot or ground in controversy.

Here such prior actual occupancy is admitted.

Third. There the mistakes are those of facts, produced in some part by the perjury of witnesses. Here the facts are undisputed, but because the lands are valuable for minerals, not because any vein or mine exists on this lot, or because of any prior existing valid mining claim, the Department decides, as conclusion of law, that defendants did not have and could not acquire any right to the possession, or to have the title come to them from the Government.

If that is good law; if lands which may be valuable for the minerals which are in them, or in other words what are known by the generic term mineral lands, can not be settled upon when a part of the public domain, and occupied for town-site, and no part of said lands, then the patent is conclusive upon us in equity as well as law. If that view of the law is erroneous, then the plaintiffs have the title which belongs rightfully to us, and we should have our own.

If it shall be urged on this appeal that the pleader did not set forth in his answer that the appellants prosecuted the case to the Secretary of the Interior I answer that, while ordinarily the rule will be enforced that before a party can come into court for a remedy he must exhaust all his remedies in that tribunal specially charged by law with the conduct of the matters involved, this Court will not shut its eyes to the fact that in the other case from the same Land District, the same identical question had been presented to and decided by the highest officer then acting in the Land Department, and the rule which governs courts in their practice would apply,—that it is not necessary to vex a court by raising and presenting the same question more than once to enable a party to have that qustion reviewed by a superior tribunal.

I pass now to a consideration of the Betterment acts.

It will be seen that Congress has undertaken to extend the relief secured by this Betterment statute of the Territory, to just such a case as this. Here was an occupant of land, the title to which was granted by the United States after the improvements were made. These occupants had color of title; they had made valuable improvements thereon; their good faith was manifest; relying upon the theretofore unbroken decisions of the Land Department in favor of such town-site occupants, they had made these improvements. They had a right to rely upon those decisions, and to expect that the title in due course would come to them through the trustees provided by law.

Are they to be deprived of the benefits of this Betterment Law, simply because they knew the title was yet in the Government, and was thereafter to be granted?

Before either of these parties occupied or claimed these lands, they knew Congress had affirmed the Betterment Act of this Territory. It was in force when the Congressional Enactment was passed, and one who takes title from the United States takes it with that Act of Congress staring him in the face.

Congress had the right to engraft this statute upon the law relating to the disposal of the mineral lands or other lands, and when the Appellees took their title they took it upon condition that the courts would, in just such a proceeding as this, grant the occupant such relief as was secured to him by that statute.

It is true that the statute of this territory is quite liberal toward the adverse occupant of lands belonging to another, and might in that respect where it provides for the payment of the price of the land by the occupant, be held invalid in cases where the title, before the adverse occcupation, was held by private ownership. But the public unappropriated lands belong to the Government. It may do what it will with them, and if, as we claim it has in this case, Congress makes provision that the relief secured to the occupant by the statute of Dakota, where the land lies, shall be given to him, one who purchases and takes the title to such lands from the Government, takes such title subject to such relief being granted.

It will be observed that our statute gives to the grantee the benefit of all that was done by the grantor, so if this Court shall be unable to afford relief to the Appellants, as town-site occupants, the judgment ought to be reversed, and they ought to be allowed the benefit of the Betterment Act. The provisions of that act we have quoted at length in a former part of this argument.

All of which is, with great respect, submitted.

G. C. MOODY,
Counsel for Appellants.

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ARGUMENT OF APPELLEES' COUNSEL.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 563.

Philander E. Sparks and Frank M. Allen, *Appellants*,

vs.

Moses Pierce, George Berghoffer, James McAleer and Mary A. Bogle, *Appellees*.

Van Cise & Wilson, J. W. Smith, *Counsel for Appellees*.
G. C. Moody, *Counsel for Appellant*.

APPEAL FROM DAKOTA TERRITORY.

Black Hills Pioneer Print, Deadwood, Dak.

IN THE SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1885.

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vs.

MOSES PIERCE, GEORGE BERGHOFFER, JAMES MCALEER AND MARY A. BOGLE, *Appellees.*

APPEAL FROM DAKOTA TERRITORY.

VAN CISE & WILSON, J. W. SMITH, *Counsel for Appellees.*
G. C. MOODY, *Counsel for Appellant.*

ARGUMENT OF APPELLEES' COUNSEL.

This cause was heard and judgment rendered on demurrer to defendants' (appellants') answer and counter-claims. As the issues can be more fairly presented, by printing the pleadings than attempting any abstract, we submit them in full. The action was one in ejectment. The complaint of the appellees, (plaintiffs in the court below) was as follows:

The plaintiffs complain and allege:

That on the 11th day of December, 1878, they were the owners and seized in fee and lawfully possessed and entitled to the possession of that certain real property hereinafter described, situate in Lawrence County, Dakota Territory,

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The plaintiffs complain and allege:

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deriving their title thereto from an entry and purchase thereof from the United States Government, Nov. 30, 1877, which entry was subsequently confirmed by patent, March 22, 1880. Said real property is described as follows: The certain placer mining ground known as Mineral lot No. 40, embracing a part of the unsurveyed public domain in Lost Placer Mining District, containing three and eighty-one one-hundredths acres, more or less, as particularly described in said patent, recorded at page 507 of book No. 11 in the office of the Register of Deeds of said Lawrence County.

2. That while the plaintiffs were such owners, and so seized and possessed and entitled to the possession of said real property and premises, the defendants afterwards, to-wit: On or about December 12, 1878, did, without right or title, enter into and upon the same, and particularly the portion thereof described as a tract fronting eighteen feet on the Deadwood road, and running back a uniform width eighty feet to the northerly line of said mineral lot No. 40, near corner No. 4 thereof and at the mouth of Hidden Treasure Gulch, and did, then and there, oust and eject plaintiffs therefrom, and ever since that day have withheld and still unlawfully withhold the possession thereof from plaintiffs to their damage in the sum of five hundred dollars.

3. That the value of the rents and profits of said real property and premises from the said 12th day of December, 1878, and while the plaintiffs have been excluded therefrom is ten dollars for each and every month.

Wherefore plaintiffs demand judgment against said defendants:

For the recovery of possession of the real property and premises so wrongfully withheld by defendants.

For the sum of $500 damages for the wrongful withholding thereof.

For the sum of ten dollars per month since December 12, 1878, the value of the rents and profits thereof.

For the costs of this action.

The answer of appellants (defendants in the court below) was as follows:

Now come the defendants and in answer to the plaintiffs' complaint, deny each and every allegation thereof except as hereinafter stated.

I.

For a further answer and defense and by way of a counter-claim the defendants upon information and belief, allege:

1. That on the 28th day of February, 1878, the premises described in Plaintiffs' complaint, together with others, were lawfully selected, appropriated, located, used and occupied for and as a town-site and for town-site purposes, and as such was laid out into lots, blocks, streets and alleys, and known and designated as Central City.

2. That said town was upon said day lawfully selected and had been duly located upon the unappropriated public lands of the United States, and laid out into lots, blocks, streets and alleys, at which time it contained a population of about one hundred inhabitants, and henceforth grew with great rapidity, until the 22d day of March, 1880, the date of the plaintiffs' patent as set forth in the complaint, at which time it was an important town, containing a population of about two thousand inhabitants.

3. That on said 28th day of February the grantor of defendants was in the peaceable and lawful occupation and possession under a claim of ownership of the land described in the complaint as detained by the defendants, the same being in and a part of said Central City, and known as, and called lot No. 53, situated on the northwest corner of Hidden Treasure and Main Streets, being seventeen feet front on Main Street and running back a depth of eighty feet; and that said lot with the improvements thereon was purchased by defendants on December 12th, 1878, for a valuable consideration in good faith, who now own the same by a regular chain of conveyances from the original locator and occupant thereof, on February 28, 1877.

4. That said land was, at the last named date, ever since has been, and now is, within the limits of said Central City town-site, and was one of the lots therein so originally located, laid out, used and occupied for trade and townsite purposes as hereinbefore stated, and that the same, during all that time has been by the defendants and their grantors, occupied as a town lot for the purpose of business and trade in said city, and not for agriculture, with improvements thereon consisting of buildings which have since from time to time been improved and kept repaired.

5. That after the said 28th day of February, and prior to the 30th day of November, 1877, the plaintiffs without any legal right caused certain ground on

Deadwood gulch, including a part of said townsite of Central City and all of the ground in controversy, to be surveyed as and for a placer mining claim and called the same number 12 above discovery, and caused an application for a patent based upon said survey to be filed in the U. S. land office at Deadwood, in said county of Lawrence.

6. That said placer claim as first located did not embrace the said lot of defendant, and was not located until long after the said appropriation of said lot for townsite purposes as aforesaid.

7. That after said application for patent which included defendants' lot, and within the time required by law, the inhabitants of said town, including the grantors of defendants, protested in writing filed in said land office against the issuing of the patent so applied for, basing said protest upon the ground among others that said land was subject to the prior rights of the townsite occupants, including the defendants' grantors, under the law and also upon the further ground that said land was not mineral and so could not be patented to plaintiffs as such, but that notwithstanding said protest the said local land officers on the 30th day of November, 1877, received from plaintiffs the sum of $2.50 per acre for said placer claim No. 12 and the fees provided by law, and issued to them a receipt therefor, which payment and receipt are commonly called an entry.

8. That thereafter and on the 22d day of April, 1878, the commissioner of the general land office reviewed said proceedings, application for patent and protest, and directed that patent issue to said applicants for patent for said placer mining claim, but with an exception or reservation excepting and reserving from the grant therein all town property, rights upon the surface and all lots, blocks, streets and alleys, and all houses, buildings and improvements thereon not belonging to said plaintiffs, and all rights necessary and proper to the occupation and enjoyment of the same, which said ruling and decision was wholly in accordance with law, and according to the long established and settled practice of the Department of the Interior in such cases.

9. That thereafter to-wit: On November 7th, 1878, and without any appeal having been taken from said decision, said commissioner made an order suspending said entry, and ordered that a hearing be had before the officers of said local land office to determine the date when said land was first occupied as a town, the character and extent of such occupancy, and the improvements thereon, and whether the land was mineral or non-mineral in character, which hearing was commenced before said local officers on the 26th day of November, 1878.

10. That upon such hearing both parties submitted their testimony after which on the 20th day of January, 1879, said local officers decided in substance that the land was valuable for minerals, but had been appropriated for townsite purposes prior to any appropriation by plaintiffs, and that the land should be awarded to the occupants of said Central City town-site, including the defendants, subject to the right of the plaintiffs to mine and extract the gold therefrom if in so doing they did not materially interfere with the possessions, buildings and improvements of said town occupants including defendants.

11. That both the said town occupants and the said plaintiffs were satisfied with said decision and no appeal was taken therefrom by either party, but on the contrary an appeal therefrom was especially waived by both parties, but thereafter in the absence of any appeal, and notwithstanding said waiver of appeal, and on the 6th day of October, 1879, the said commissioner reviewed said decision and decided that said townsite claimants and occupants, including defendants, had no right whatever to the land, upon the sole ground that it was mineral and therefore not subject to appropriation except under the mineral law of 1872, and that said land of defendants with their improvements was the property of the plaintiffs.

12. That at said hearing and review there was no dispute as to the fact that the said townsite occupants and claimants were the first appropriators of the land, and that defendants and those through whom they claimed had acquired an interest in and occupied and used the premises in controversy in the suit for the purposes hereinbefore stated prior to any appropriation on the part of plaintiffs, yet notwithstanding these undisputed facts said commissioner decided that the fact of such prior appropriation as aforesaid gave no rights to the inhabitants or occupants of said townsite land, nor to the defendants.

13. That said decision was based upon the sole ground that the land was mineral in character, and therefore no recognition or protection could be afforded under any law to the rights or claims of said townsite occupants, or to the defendants, in or to the said lands or improvements thereon, or any part thereof, but were the property of plaintiffs as aforesaid, whereupon said commissioner dismissed said protest and wrongfully and illegally directed a patent to

issue to plaintiffs for said lands as mineral lot No. 40, without any exception or reservation therein to protect the possession and improvements of defendants and their grantor or any of said town occupants, which patent was thereafter, on March 22, 1880, issued accordingly, and which patent constitutes plaintiffs' title in this suit. Whereas said patent should have contained a reservation excepting therefrom all town property rights and all houses, buildings, structures, lots, blocks, streets and alleys and other improvements on said land not belonging to plaintiffs, and all rights necessary or proper to the occupation, possession and enjoyment of the same as by law in such cases made and provided.

14. That said decision of said commissioner last referred to, and the granting of said land to plaintiffs without excepting and reserving the possesssion, improvements and rights of defendants and other town occupants, were contrary to law, and was and are erroneous constructions of law with reference to the rights of defendants and other of said townsite occupants, upon said undisputed facts as to said priority of appropriation for townsite purposes, and by reason thereof and of the said patent issued in pursuance thereof, the plaintiffs have acquired and now hold in trust for the defendants the above described piece of ground now in controversy in this suit, and all improvements thereon which should be conveyed by plaintiffs to defendants.

15. That the defendants have always been and now are ready and willing and hereby offer to pay to plaintiffs their just proportion of the legal expense in procuring said patent or conveyance.

II.

For further defense and counter-claim defendants allege:

That on the 28th of February, 1877, the premises in controversy were lawfully appropriated for townsite purposes as stated in the preceding and first defense contained in this answer.

2. That the allegations of said defense in relation to the townsite of said Central City from its first location to and including the award of said patent to plaintiffs, are referred to now and made a part of this counter-claim with the same effect as though all such allegations were fully restated in this defense.

3. That on said 28th day of February, one F. J. Ames, being one of the inhabitants of said townsite, was in the peaceable and lawful occupancy and possession claiming to be the owner thereof of the premises in controversy in this action as described in the said first defense herein, at which time said Ames had a building and other improvements thereon, and that during all the time thereafter up to and until and at the time of the sale and conveyance of said premises to defendants as hereinafter stated, the said Ames remained in continuous occupation and possession of said premises, occupying and using the same as a town lot for the purpose of business and trade, claiming the title thereto in good faith against all persons except the United States, and claiming the right to acquire the title of the United States thereto as a town lot.

4. That thereafter, to-wit: On the 12th day of December, 1878, and while the said Ames was so as aforesaid in the lawful, quiet and peaceable possession and occupation of said premises, claiming title thereto, he did for a valuable consideration sell and by a good and sufficient deed convey the said premises to the defendants, who in good faith purchased the same and received the said deed and the possession of said premises from said grantor, and have at all times and until the commencement of this action occupied and possessed said premises under said deed, claiming title thereto in good faith adversely to the plaintiffs, and before the plaintiffs acquired any title thereto defendants in good faith made permanent improvents upon said premises, which improvements and the value thereof are more particularly set forth as follows: One frame building one story high, 40x17 feet in dimensions of the value of $750; also in the rear thereof a brick fire proof building 13x40 feet in size, of the value of $750. That said values are independent of the ground, and said premises are used in the grocery business.

5. That the value of said land aside from the said improvements thereon will not exceed the sum of one hundred dollars.

Wherefore the defendants pray——

That the plaintiffs take nothing by this suit.

That plaintiffs be decreed to convey to the defendants said premises in controversy, excepting and reserving to the plaintiffs in such conveyance the right to mine and extract the precious metals from said premises, provided that in so doing the plaintiffs shall not materially injure, endanger or interfere with the buildings and improvements thereon, and the necessary use, occupation and enjoyment of the premises by defendants.

That in the event that it should be determined that the plaintiffs are the owners of and entitled to the possession of said premises, then that the value

of the land aside from the value of the improvements thereon, and also that the separate value of the improvements be specifically found and that the defendants have judgment for the value of their said improvements.

For such other and further relief as may be just, with costs.

To each of these counter-claims the plaintiffs (appellees) demurred upon the ground that each of them failed to state facts sufficient to constitute a defense to the action, or a counter-claim in the defendants, (appellants) favor against the plaintiffs (appellees.) Upon argument these demurrers were each of them sustained. Thereupon, defendants (appellants) declined to plead further, electing to stand upon their counter-claims as pleaded; the damages were stipulated by counsel at $1.00, value of occupancy at $1.00 and judgment was rendered for the recovery of possession as prayed.

An appeal was then taken to the Supreme Court of the Territory, where the judgment of the District Court was affirmed. From that judgment of affirmance, an appeal has been taken and the cause brought here for final hearing.

The points assigned as error, are—sustaining the demurrer to the counter claims and rendering judgment thereon.

In our view, the first demurrer raises two questions: (1. Can title to lands that are valuable for minerals be acquired in any way except under the mining laws? (2.) If it can, yet have appellants alleged such equities in themselves as entitle them to control the title so acquired by appellees, and to have a trust declared in their favor? (3.) The second demurrer raises the question, whether appellants on the facts pleaded are entitled to compensation for betterments as a condition precedent to appellees' recovery of the possession. These propositions will be considered in their order.

I.

Prior to 1866, the policy of our Government, from its organization, was to reserve from sale all lands containing minerals, or, as usually stated in the laws, all known mines. In the laws creating the first land system—disposal by sale or donation—the sale of mineral lands was prohibited. The pre-emption act exempted from its operation, "lands on which are situated any known salines or mines." The homestead law provided, "nor shall any mineral lands be liable to entry and settlement," as a homestead.

It has been the policy of the government at all times, in disposing of the public lands to reserve the mines for the use of the United States.

United States vs. Gratiot, 14 Peters, 526, 538.

Morton vs. Nebraska, 21 Wall. 660.

Although acts were passed from time to time, authorizing the leasing of mines, yet it is to be noticed how uniformly careful the Government was to reserve the title in these properties to itself. In grants of land to aid in constructing railroads the exception was always made. See

Act of July 1862, Sec. 3, 12 U. S. Statutes, 489.

Act of July 1864, Sec. 4, 13 U. S. Statutes, 358.

Act of July 13, 1866, 14 U. S. Statutes, 94.

Act of July 25, 1866, 14 U. S. Statutes, 239.

On January 20, 1865, Congress, by joint resolution recorded its construction of the acts passed the preceding summer: "That no act passed at the first session of the 38th Congress, granting lands to States or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant." 13 U. S. Statutes, 567.

In grants of lands to the States, there has been equal care to reserve the mineral lands. See 10 U. S. Statutes, 248; 12 U. S. Statutes, 410 and 513; 14 U. S. Statutes, 218.

In the acts granting lands for school purposes to California and Nevada, the reservation was not clearly expressed; but in Nevada the court held that mineral land did not pass, and that under a selection of school land in sections 16 and 36, the state could not appropriate mineral land.

Heydenfeldt vs. Daney G. & S. M. Co., 10 Nevada 290.

This decision was subsequently affirmed by the United States Supreme Court, in 93 U. S. 634.

The Supreme Court of California held differently, construing the act of Congress of March 3, 1853, to pass mineral lands in the grant of the 16th and 36th sections in each township for school purposes.

Higgins vs. Houghton, 25 Cal. 252.

This view was, however expressly overruled by the Supreme Court of the United States, which in an able opinion by Justice Miller, declared: "Congress, after keeping this matter in abeyance, about sixteen years, enacted in 1866, a complete system for the sale and other regulation of its mineral land so totally different from that which governs other public lands as to show that it could never have been intended to submit them to the ordinary laws for disposing of the territory of the United States. Taking into consideration what is well known to have been the hesitation and difficulty in the minds of Congressmen in dealing with these mineral lands, the manner in which the question was suddenly forced upon them, the uniform reservation of them from survey, from sale, from pre-emption, and above all from grants, whether for railroads, public buildings, or other purposes, and looking to the fact that from all the grants made in this act they are reserved, one of which is for school purposes beside the 16th and 36th sections, we are forced to the conclusion that congress did not intend to depart from its uniform policy in this respect in the grant of those sections to the state."

Ivanhoe M. Co. vs. Keystone Con. M. Co., 102 U. S. 167.

It was left for the act of July 26, 1866, first to declare "That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become such, subject to such regulations as may be prescribed by law and subject also to the local customs or rules of miners."

The law of 1872 changed the first section to read: "All valuable mineral deposits in lands belonging to the United States, "both surveyed and unsurveyed, are hereby declared to be free "and open to exploration and purchase, and the lands in which "they are found to occupation and purchase," etc. In this act was incorporated the provision for patenting placers, which had been adopted July 9, 1870. And in the Revision, Sec. 2318 was introduced from another act, declaring formally the uniform policy and practice of the government: "In all cases lands valuable for "minerals shall be reserved from sale, except as otherwise expressly directed by law." This was but crystallizing into statute what was already the known and recognized law of the land. And all other statutes, agricultural, townsite, or those granting lands to States or corporations, must be construed with reference to this known and settled policy and practice.

It will be found the townsite laws contain the same reservations. The first general legislation by Congress on this subject was the act of May 23, 1844, providing that "Whenever any portion of "the surveyed public lands has been or shall be settled upon and "occupied as a townsite, * * * it shall be lawful " * * * for the corporate authorities thereof, or

"Judge of the County Court, to enter the same in trust," etc. A number of special acts were subsequently passed, of the same general character, for the benefit of Salt Lake City, Denver, and othe cities and towns. In 1864 the act was passed authorizing the President, in case of parties having founded, or desiring to found, a town on surveyed or unsurveyed land, to set the same apart and direct a sale of the lots at a minimum price of $10 a lot. To this an amendment was added March 3, 1865, providing: "Where mineral veins are possessed, which possession is recognized "by local authority, and to the extent so possessed and recognized, "the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof," etc. This reservation is now preserved in Section 2386 of the U. S. Revised Statutes. It will be noted, however, that at the time of the enactment of this provision, there was yet no law for the disposal of mines, and the measure was therefore only precautionary, and the assertion again of the Government's general policy. On March 2, 1867, (after the passage of the mining act), there was an amendment of the townsite law of 1844, extending its provisions to unsurveyed as well as surveyed lands, and this section was added: "No title "shall be acquired under the foregoing provisions of this chapter "to any mines of gold, silver, cinnabar or copper." June 8, 1868, these words were added: "Or to any valid mining claim or possession held under existing laws." The section thus amended forms Section 2392 of the U. S. Revised Statutes.

It will thus be seen that we are not obliged to rely on Sec. 2318,—"In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law," for the town-site acts themselves contain the reservation.

Counsel, we believe, contend that quartz mines are equally subject to townsite entry, and cite the old practice of the Land Department of granting patents for mines with surface reservations in favor of town occupants—this, too, in the face of the guaranty given to the locators of "the exclusive right of possession and "enjoyment of all the surface included within the lines of their "locations." Such a reservation would be clearly unwarranted, and therefore void, and was so held by the Supreme Court of Montana in a very interesting opinion by Chief Justice Wade, (Silver Bow Mining & Milling Co. vs. Clarke, 5 Pac. Rep. 570.)

The Supreme Court of Arizona has gone farther, and held in the case of the town of Tombstone, that a locator of a mine who has reduced his claim to possession, though he has not yet made an actual discovery of ore, may maintain ejectment against those who erect stores and dwellings upon the surface of his location. (Field et. al. vs. Gray et. al., IX Copp's Land Owner, 157.)

If this be the law in the case of quartz locations, and they are guaranteed the exclusive right of possession and enjoyment of all the surface, much more must it be so of placer mines, which are comparatively valueless if the surface is otherwise occupied. A quartz mine may be operated without disturbing the surface, but in placer mining the surface is frequently as essential as the gravel. There must be place for ditches, room for shoveling and for depositing tailings, and oftentimes there is pay in the dirt, as miners say, "from the grass roots down." A patent to a placer claim, with the surface reserved to the use of some one would be a grant burdened with an easement that would defeat its enjoyment. The grant and the reservation would be inconsistent, hence the latter must fall.

But, plead the appellants, in their counter claim, "Said patent (appelles' patent to the ground in controversy,) should have contained a reservation excepting therefrom all town property rights, and all houses, buildings, structures, lots, blocks, streets and alleys, and all other improvements on said land not belonging to plaintiffs, and all rights necessary or proper to the occupation, possession and enjoyment of the same, * * * and the granting of said land to plaintiffs (appellees) without excepting and reserving the possession, improvements, and rights of defendants and other town occupants, was contrary to law, and was and is an erroneous construction of the law," etc.

Where do counsel find the law authorizing such a reservation? The only conditions or qualifications authorized to be inserted in a mining patent are those named in Secs. 2338, 2339 and 2340 of the Revised Statutes—the provision that "local legislatures may provide rules for working the mines, involving easements, drainage and other necessary means to their complete development," and that the miner's possession shall be subject to the vested and accrued water rights etc., and the right of way for constructing ditches and canals therefor. Nowhere is a reservation permitted or contemplated of the character pleaded.

It is a gross error to suppose that the miner's patent conveys to him only the minerals, apart from the soil or rock in which they may be found. The law is very explicit on this point. It is the *lands* valuable for minerals that are reserved from sale except as otherwise provided by law (U. S. Revised Statutes Sec. 2318); the *lands* that are open to occupation and purchase (Sec.

2319;) a patent for any *land* claimed and located for valuable deposits may be obtained by any person, etc., having claimed and located a *piece of land* for such purposes, upon taking the necessary steps, and upon the payment to the proper officer of five dollars *per acre*, (Sec. 2325); and in other sections similar language is found.

A location on a vein must be made by taking up a *piece of land* to include it.

Gleeson vs. Martin White Co., 13 Nev. 458.

The U. S. Revised Statutes frequently use the expression "mining claim." This is defined as "a *parcel of land* containing precious metals in its soil or rock."

Smelting Co. vs. Kemp, 104 U. S. 649.

The patentee obtains the government title to the entire land, soil, mineral and all.

Forbes vs. Gracey, 94 U. S. 767.

We submit that any practice of the Land Department, of making reservations in mineral patents in favor of occupants of the surface, is clearly unwarranted, has never been sustained by the courts in a single case that has come to our knowledge, and is antagonized by the decisions we have just cited. It is due to this branch of the government to say, however, that its holding has not been recently as pleaded by appellants. The ruling on the issuance of the patent in controversy was in harmony with a number of decisions in same office based on the view that "If the land is mineral it was subject to location only under the provisions of the mining law, without reference to the relative value of a portion of the tract for townsite purposes." (See sundry decisions, Copp's Mineral Lands pp. 186, 232, 234, 263, 274, 324, 339.

The language used in Steele vs. Smelting Co., 106 U. S. 450, 449, would seem to be conclusive on this question that mineral lands cannot be the subject of townsite patents, but can only pass under the mineral laws: "The acts of congress relating to townsites, recognize the possession of mining claims, within their limits, and forbid the acquisition of any mine of gold, silver, cinnabar or copper within them, under proceedings by which title to other lands there situate is secured; thus leaving the mineral deposits within town-sites open to exploration, and the *land in which they are found to occupation and purchase*, in the same manner as such deposits, are elsewhere explored and possessed, *and the lands containing them are acquired*. Whenever, therefore, mines are found in lands belonging to the United States, whether within or without townsites, they may be claimed and worked provided existing rights of others from prior occupation are not interfered with. * * * To such claims (mining claims) though situate within the limits of what may be termed the site of the settlement or new town, the miner acquires as good a right as though his discovery was in a wilderness, removed from all settlements, and *he is equally entitled to a patent for them.*"

Let it be borne in mind that the case just cited was an action of ejectment brought to oust a surface occupant, who claimed as appellants do here, a prior possession, a prior occupancy, municipal improvements, etc. And the court makes perfectly clear the question of conflicting claims, or what it means by "existing rights of others," (p 450): "Whether there are rights thus interfered with, which should preclude the location of the miner and the issue of a patent to him or his successor in interest, is, when not subjected under the law of congress to the local tribunals, a matter properly cognizable by the land department, when application is made to it for a patent; and the inquiry thus presented must necessarily involve a consideration of the character of the land to which title is sought, whether it be mineral, for which a patent may issue, or agricultural for which a patent should be withheld, and also as to the citizenship of the applicant." The court then cites its own numerous decisions to support the conclusion that the decision of the land department that the land in controversy was mineral is conclusive on that subject.

This is precisely our position here,—a title by mineral patent, based on an entry made after decision by the land office that the land was valuable for minerals (see appellants' first counter-claim paragraphs 10, 11.) And this establishes our right, shows the land subject only to mineral entry, and not subject to townsite entry.

II

But, contend counsel by their plea, the decision of the land department in refusing to insert a reservation in the patent in behalf of surface townsite occupants was contrary to law and was an erroneous construction of law, etc. The endeavor is to place themselves within the line of those decisions which have held that where the land officers "have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties rights which upon a correct construction, would have been conceded to them, * * that the courts can, *in a proper proceeding* interfere and refuse to give effect to their action." Quinby vs. Conlan, 104 U. S. 426

The appellants admit by their plea that they had a full and fair hearing; that it was a matter of which the land office had jurisdiction, that no adverse claim was made to the land; no fraud or imposition or mistake of fact is alleged—reliance is placed wholly on the alleged misconstruction of law.

The burden was on them to show that the land was non-mineral in character before it could be open to their claims at all. Secretary vs. McGarrahan, 9 Wallace, 298.

But while appellants attempt to plead misconstruction of law they overlook another important and essential element. They must have equities of their own. Suppose, for the sake of the argument, the Land Department had committed an error in not inserting the reservation in appellees' patent, is that alone any reason why appellees should be decreed trustees for appellants and compelled to convey to them the fee, reserving the right to mine? This would seem to be asking a good deal of judicial legislation.

The remedy of the aggrieved party must be sought by him in a court of equity, if he possess such an equitable right to the premises would give him the title if the patent were out of the way. If he occupy with respect to the land no such position as this, he can only apply to the officers of the government to take measures in its name to vacate the patent or limit its operation.

Steele vs. St. L. Smelting Co. 106 U. S. 447.

If in issuing a patent its officers took mistaken views of the law, * * a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint can not be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands. It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it. If the government is dissatisfied it can, on its own account, authorize proceedings to vacate the patent, or limit its operation.

Smelting Co. vs. Kemp, 104, U. S. 636.

Have appellants pleaded such equities as should control the title in the patentees' hands? They admit the land is valuable for minerals, that the land department so decided, and they acquiesced in the decision. They plead no steps taken by them to secure a title, no application to enter the land as a town-site, through municipal authorities or county judge no expectation of making such application. They were mere squatters on the public domain, sitting idly by while appellees located their mining claim, did the necessary work and procured a patent.

The townsite entry has been spoken of as a "municipal pre-emption;" parties claiming under it hold no closer relation to the Government title prior to purchase than an ordinary pre-emption claimant. Mere entry upon land, with continued occupancy and improvement thereof gives no vested interest in it.

People vs. Sherer, 30 Cal., 650.

Frisbie vs. Whitney, 9 Wallace, 187.

Yosemite Valley Case, 15 Wallace, 77.

Shepley vs. Cowan, 91 U. S. 238.

Were this patent out of the way, and mineral land were held subject to townsite entry, yet nothing is pleaded to show any effort on appellants' part to seek or obtain the title. And if a townsite entry had been made and appellees' patent withheld, yet could title to the ground in dispute have passed in the face of the language used in Sec. 2392 U. S. Rev. Statutes. "No title shall be acquired under the foregoing provisions of this chapter to any mines of gold, silver, cinnabar or copper; or to any valid mining claim or possession held under existing laws?"

The Supreme Court of Oregon, in Gold Hill Mining Co. vs. Ish, (cited, Copp's Min. Lands 454) held that an agricultural patent did not pass title to a quartz mine in possession of the locators, within the limits of the patented area, and declined to declare the patentee a trustee for the Mining Company on that ground, that the patentee had no title which a court of equity could compel him to convey, but referred the mineral claimant to an application for injunction to restrain Ish from asserting any title to the lode or interfering with the plaintiff's working it.

Appellants admit, by admitting the entry and patent, appellees' possession of the mining claim in controversy and doing all that was necessary to obtain a patent. They cannot dispute this. The patent is evidence of a perfected right established by the final adjudication of the tribunal erected for the especial purpose, and carries with it the presumption that every requisite prescribed by law for the acquisition of title has been duly performed.

Smelting Co. vs. Kemp, 104 U. S. 636,

Steele vs. Smelting Co. 106 U. S. 447.

In Stark vs. Starr (6 Wallace 402) it was held that a claimant to lots in the city of Portland, under the townsite act had no right that would control a patent issued under the Donation Act. The municipal authorities not having received any title or estate in the premises could impart none to him. "His position is therefore reduced to that of a mere possessor without title. Such possession is entirely insufficient to justify the interposition of equity for the determination of the defendant's title. The plaintiff must first show in himself some right, legal or equitable, in the premises, before he can call in question the validity of the title of the defendant."

In Doll vs. Meador et. al. (16 Cal. 295) a judgment in ejectment was sustained against the claimants of town lots and improvements in the town of Red Bluff. The plaintiff had a patent from the state, the defendants had their improvements, lots, blocks, streets and alleys, but alleged no municipal entry. The court says (p 326): "The defendants in the present case stand in no privity with the United States and possess no claim, legal or equitable, to the lands upon which they are settled. The proffered offer of the general government to invest them with a title, through the action of certain officers, has never been accepted, though years have passed with the offer pending before them. The offer is therefore withdrawn and their position is like that of any others who occupy without right."

In Chapman vs. Quinn, (56 Cal. 266), the right of defendant to declare plaintiff's patent held in trust for him was denied. This was a case of agricultural claimants, but the language of the court bears closely on the case at bar, (p 278): "It is enough to say that in no case to which we have been referred has relief in the nature of that here sought been granted to one who, like defendant, has never filed a declaratory statement, never made proof of settlement, never paid any money, never received any certificate or other recognition from the officers of the land department, but who went upon the premises after the inauguration of a contest between other claimants to the same land, and at a time when, by the rules and regulations then in force in that department, he had no right to file a declaratory statement, and consequently no right to make proof or payment—no right to pre-empt the land."

This language becomes especially pertinent when it is noticed that appellees' entry was first made November 30, 1877; that it was suspended and an order made to take proof of the character of the land November 7, 1878, and the taking of such proof begun November 26, 1878. (Appellants' first counter-claim paragraphs 7, 9.) Appellants allege their entry on the land December 12, 1878, (second counter-claim par. 4.)

The case of Chapman vs, Quinn was taken to the Supreme Court of the United States, where the judgment was affirmed. (111 U. S. 445.) In its opinion, this court fully sustains the language used by the California court: "What is Mr. Quinn's equity? He has never paid a dollar for the land; has received no title, nor any recognition of his claim from the government or any one else. * * * His claim has been denied by the land office from the beginning; he has paid nothing, received no recognition, acquired no vested right. We see no equity in him equal to that of the heirs of Hollingsworth. There is no justice in taking the title which they had fairly acquired and vesting it in him."

The case of Drew vs. Valentine, 18 Federal Reporter, 712, is a strong one. It was a bill in equity and passed off on demurrer to the bill. The defendant held title to a portion of a town, acquired by a location of Valentine scrip; the plaintiffs had no title, but alleged occupancy by themselves and those under whom they claimed for more than forty years, and great improvement in value. The court expressed its sympathy with plaintiffs, but its powerlessness to grant relief. "The difficulty," we quote from the opinion, "in the way of the complainants is, that their occupancy, not being under the law, has conferred upon them no legal or equitable estate, and they cannot be heard to question the title of one who claims under a patent from the United States."

The recent case of Ferry vs. Street, 7 Pac. Rep. 712, is like it, a case of Valentine scrip against squatters. The Court says: "Those squatters had taken no measures or steps to procure title under the town-site law,—filed no papers in any tribunal entitling them to act as such. If it was desired and within the law to plat a town-site entry, they had ample opportunity. Until they did so, they were mere trespassers, and the land was unappropriated, and it was open for the government to eject them."

Bohall vs. Dilla, 115 U. S. 47, although a case between agricultural claimants, is much like the case at bar, in some respects. The plaintiff, holder of the patent, brought ejectment. The defendant pleaded a counter-claim in equity asking that plaintiff be declared his trustee and required to convey him the legal title. On the facts shown, this court affirms the judgment of the California Supreme Court, declaring: "We do not think the claim of the defendant to the equitable relief he seeks can be sustained on the grounds stated in his answer or cross-complaint. To charge the holder of the legal title to land under a patent of the United States, as a trustee of another, and to compel him to transfer the title, the claimaint must present such a case as will show that he himself, was entitled to the patent from the government, and that in consequence of erroneous rulings of the officers of the land department upon the law applicable to the facts found, it was refused to him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. It must appear that by the law properly administered the title should have been awarded to the claimant."

Between appellants and the title here—even were appellees' title out of the way—stand as pre-requisites to their getting it, (1) a showing that this is land subject to entry as a town-site, (2) qualifications for entry under the town-site act, (3) application to enter and erroneous ruling denying the application, (4) right of these individual claimants to this specific piece of property under such entry, if accomplished, and the rules and regulations of the local legislature. None of these things are pleaded. Without them appellants are as the merest strangers to the title, and wholly without equity. And under what authority can they maintain an action or plead this counter-claim? Their application to enter should have been through the county judge or municipal authorities, (U. S. Revised Statutes Sec. 2387) whom the law makes their trustee, and through whom only can the title they think rightfully theirs be acquired. Should not the counter-claim here have been set up in the trustee's name? And what is the relief asked? That plaintiffs be decreed to convey to them the premises, reserving the right to mine, etc. Why, what warrant of law is there for this? Or what facts justifying it? The decision of the land office pleaded as satisfactory to them, and as their view of the law, did not award them title, but a mere privilege,—their prayer is inconsistent with their facts.

The case of Nessler et. al. vs. Bigelow, 60 Cal., 98, is in point, where the inhabitants of Downieville were beaten in an action of ejectment by the mining patentee, although claiming to have been in peaceful possession for ten years before the issuance of the patent, and five years thereafter before bringing of the action. They set up their equities in the answer, improvements amounting to millions of dollars, and asked that the plaintiffs be declared trustees of the title for them, etc., much as the defendants do here. Their equitable defense, however, did not avail.

Smelting Co., 106 U. S. 447, passing on the plea of estoppel, if not that a mere squatter cannot be heard, who has himself taken no steps to secure title? "These allegations are very far from establishing such an equity in the defendants as to estop the patentee and those claiming under him from asserting the legal title to the premises. These matters could not operate to estop the government in any disposition of the land it might choose to make. Its power of alienation could not be affected *until the acts required by law to acquire a vested interest in the land*, and it is not pretended that they took any steps to secure such an interest. Whatever right, therefore, the government possessed to use or dispose of the property, free from any claim of the defendants, it could pass to the grantee."

Again, if appellants had a right to the possession of this land, and to the title, why did they not file their adverse claim in the land office, and thereafter, within thirty days, commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment? Sections 2325 and 2326 S. S. Revised Statutes may be intended primarily for conflicting mining claims, but the land department and the courts exhibit a growing tendency to construe them as including by necessary implication all conflicts with mining claims. Accordingly a placer claim may adverse the application of a quartz claim for patent, and a quartz claim the application of placer, although the successful party must pay $5.00 per acre for his share.

A mill site can be protected against a lode entry only by adverse claim and proceedings based thereon prior to entry. 9 Copp's Land Owner, 71.

Shafer vs. Constans, 3 Montana, 369.

The land department seems to have entertained this view, in the case of Becker vs. Citizens of Central City (Cited, Copp's Min. Lands 184.) See also Leadville town-site case (6 Copp's Land Owner 4,) case of Neils Larsen et. al. (9 Ibid, 111) Rico town-site case (9 Ibid, 91) the Vizina Consolidated Mining Company case (Ibid 92) Papina vs. Alderson et. al. (10 Ibid 52, 54.)

From the briefs of counsel in Nessler et. al. vs. Bigelow et. al. (60 Cal. 98) it would appear that this question was before the court and may have been considered in reaching a decision, though not referred to in the opinion.

It would appear, too, that something of this view must have been in the mind of the court in St. L. Smelting Co. vs. Kemp, (104 U. S. 647), when in the conclusion of his opinion Mr. Justice Field says: "The statutes provide numerous guards against the evasion of their provisions by parties seeking a mining patent, and afford an opportunity to persons in the neighborhood of the claim to come forward and present any objections they may have to the granting of the patent desired. By sections six and seven of the act of 1872, which constitute sections 2325 and 2326 of the Revised Statutes, the procedure which a party seeking a patent, whether an individual or an association or a corporation must follow is prescribed. * * * It will thus be seen that if an adverse claim is made to the mining ground for which a patent is sought, its validity must be determined by a local court, unless it be waived, before a patent can be issued. There would seem, therefore, to be more cogent reasons, in cases where a patent for such ground is relied upon to maintain the doctrine which we have declared that it cannot be assailed in a collateral proceeding, than in the case of a patent for agricultural land."

If appellants were proper adverse claimants, then their failure to adverse appellees' application constitutes a bar against their asserting any claim now. Having failed to assert their claim when invited to do so, it was presumed they made none, or waived it and if they ever had a right they lost it by this neglect.

Gwillim vs. Donnellan et. al. 115 U. S. 45.

III.

Can appellants set off or counter-claim the value of their alleged improvements?

Section 583 of the Dakota Civil Code, is a restatement of the common law on this subject: "When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed belongs to the owner of the land, unless he choose to require the former to remove it."

The provisions under which appellants urge this plea are found, however, in the Code of Civil Procedure, and are as follows:

§ 641. In an action for the recovery of real property, upon which permanent improvements have been made, by a defendant, or those under whom he claims, holding under color of title, adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a counter-claim by such defendant.

§ 642. The counter-claim in such action must set forth, among other things, the value of the land, aside from the improvements thereon, and also as accurately as practicable, the improvements upon the land and the value thereof.

§ 643. Issues may be joined and tried as in other actions, and the value of the land, aside from the value of the improvements thereon, and the separate value of the improvements, must be specifically found by the verdict of the jury, the report of the referee, or the findings of the court.

> **§ 644. The judgment of the court upon such finding, if in favor of the plaintiff, for the recovery of the real property, and in favor of the defendant for the counter-claim, shall require such defendant to pay to the plaintiff the value of the land as determined by such finding, and the damages, if any, recovered for withholding the same, and for waste committed upon such land by the defendant, within 60 days from the rendition of the judgment, and, in default of such payment by the defendant, that the plaintiff shall pay to the defendant the value of the improvements as determined by such finding, less the amount of any damages so recovered by plaintiff for withholding the property, and for any waste committed upon such land by the defendant, and until such payment or tender, and deposit in the office of the clerk of the court in which such action is pending,no execution or other process shall issue in such action to dispossess such defendant, his heirs or assigns.**

Counsel for appellants will also cite in support of these provisions, the act of Congress of June 1, 1874, (supplement to Revised Statutes, page 25):

> **Be it enacted, etc., That when an occupant of land, having color of title in good faith has made valuable improvements thereon, and is, in the proper action, found not to be the rightful owner thereof, such occupant shall be entitled in the Federal courts to all the rights and remedies, and, upon instituting the proper proceedings, such relief as may be given or secured to him by the statutes of the state or territory where the land lies, although the title of the plaintiff in the action may have been granted by the United States, after said improvements were so made.**

It will be noticed that the Dakota Statutes cited, requires: (1) That the improvements must be permanent, (2) by a party holding under color of title, (3) adversely to plaintiff, and (4) in good faith. Do these conditions exist in the present case? Without disputing the permanency of the improvements, though questioning the sufficiency of the pleading on this point, we pass to a consideration of the other questions.

(2) The second counter claim of appellants' (paragraph 2) adopts and restates as if fully pleaded the allegations in the first, whereby are admitted appellees' entry of the land Nov. 30, 1877, the protest of the citizens and subsequent contest and full hearing, beginning Nov. 26, 1878, that pending such contest and before decision, to-wit on Dec. 12, 1878, the appellants bought the land in controversy of one Ames, that on Jan. 20 1879, the local land office decided the land to be valuable for minerals, that the commissioner approved this decision, denying the right of surface reservation, and that on March 22d, 1880, patent issued to plaintiffs without any reservation; that pending these proceedings, at some date not given, defendants made the permanent improvements alleged. During all this time, then, the actual title was in the United States, the appellees seeking it, with appellants' knowledge, the latter making no opposition, no adverse claim, but only asking that the government would recognize in them a privilege of squatting on the surface. With open eyes and ears they bought into a lawsuit, knowing they could get no title from Ames and that he could give them none.

An instrument gives color of title whether the grantor acts under authority of judicial proceedings or otherwise, if by apt words of transfer it passes what purports to be the title.

Hall vs. Law 102 U. S. 461.

Could the deed pleaded by appellants pass what purported to be the title? They allege (second counter-claim, paragraph 3) that Ames their grantor was occupying this land "as a town lot for the purpose of business and trade, claiming title thereto in good faith against all persons except the United states, and claiming the right to acquire the title of the United States thereto as a town lot." This then was all he could convey, all with this knowledge that his deed could purport to convey.

An entry is by color of title when it is made under a *bona fide* and not a pretended claim to a title existing another.

McCall vs. McNeely, 3 Watts (Penn.) 72.

If from the face of the deed, compared with the law regulating the subject, the grantor might have had title.

Stark vs. Starr, 1 Sawyer 20.

The party claiming under color of title must be honest. He must believe his deed to be valid in law, and that it conveys to him a good title to the land.

Den vs. Hunt, Spencer (N. J.), 493.

McCracken vs, San Francisco, 16 Cal. 636.

Foulker vs. Bond, 11 Vroom (N. J.) 541.

(3) Is appellants' possession adverse? Unless the act of Congress of June 1, 1874, cited, avoids it, the rule is that the statute of limitations runs only in favor of parties in possession claiming title adversely to the whole world.

McCracken vs. San Francisco, 16 Cal., 635.

Humbert vs. Trinity Church, 24 Wend., 597.

Bedell vs. Shaw, 59 New York, 46, 50.

Nessler et al. vs. Bigelow, 60 Cal., 98.

Sedgwick & Wait, Trial of Title, sec. 755.

(4) Do appellants show good faith? They knew that this land was mineral land, that the title was in the United States, when they made these improvements, that the appellees had purchased and paid for the land at the rate of $2.50 an acre, more than a year before; that they had no purpose to set aside this entry, but rather to uphold it, so that it might support their tenements on the surface. They made their improvements, after the

entry of appellees, with knowledge of appellees' title and of the fact that they themselves had no title. Did they then erect these improvements to extort compensation for them from appellees? Will the law aid them in such an undertaking?

The definition of good faith given in the Dakota Civil Code is (Sec. 2105); "Good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious."

A possessor of land in good faith is one who not only honestly supposes himself to be vested with the true title, but is ignorant that the title is contested by any other person claiming a superior right to it.

Sedgwick & Wait, Trial of Title, sec. 694.
Woodhull vs. Rosenthal 61 N. Y., 396.
Wood vs. Wood, 83 N. Y., 575.
Walter vs. Quigg, 6 Watts (Pa.) 87.
Harris vs. Marblehead, 10 Gray, 44.
Wales vs. Coffin, 100 Mass., 177.
Waterman vs. Dutton, 6 Wis., 265.
Thompson vs. Thompson, 16 Wis., 91.
Carpentier vs. Small, 35 Cal., 346.
Stark vs. Starr, 1 Sawyer, 15, 25.

The definition given is that adopted in Green vs. Biddle, 8 Wheaton 1, 79, which is cited approvingly in Canal Bank vs. Hudson, 111 U. S. 66. In this last case, too, the Court adopts the interpretation of a Mississippi statute, much like this of Dakota, announced by the Supreme Court of that state in Cole vs. Johnson, 53 Miss. 94, and quotes the language of that court: "Our view is that in order to deprive the occupant of land under color of title of the value of permanent improvements erected thereon there must be brought home to him either knowledge of an outstanding paramount title, or some circumstance from which the court or jury may fairly infer that he had cause to suspect the invalidity of his own title."

The effort here to establish this counter-claim is not greatly different from the plea of estoppel interposed by the surface occupants in the Leadville case (Steele vs. Smelting Co., 106 U. S. 447) It was alleged that Starr, the patentee, was living in Leadville from 1860 until the patent was issued to him in 1879, and was cognizant of the improvements made and of the large sums of money expended on the premises; that he and his grantors fraudulently remained quiet in respect to their ownership of mining claims there, and from August, 1870, to the time of their application for a patent, never made known to the city of Leadville or to the defendants, that he or they claimed a right to any portion of the land; that other parties who made similar claims, and united with him in securing the patent, also stood by and remained quiet; that the defendants expended the sum of $5000 in making improvements on the premises in controversy, under the claim that they constituted part of a town-site on the public domain; that there was no mining on the land, and that no notice was given that would lead defendants to suppose a mineral location had ever been made; that the notice of application for patent was only published in a weekly paper, the description of the claim defective, and after defendants discovered the lands of the city were included they were assured that they would not be disturbed in their possessions, and that only a nominal sum would be demanded from them not exceeding $25 a lot, and that, relying upon said assurance, the defendants continued making improvements.

This is a much stronger array of allegations than are found in appellants counter-claim. But the court declared the plea bad, saying: "The principle invoked is that one should be estopped from asserting a right to property upon which he has, by his conduct misled another, who supposed himself to be the owner, to make expenditures. It is often applied where one owning an estate stands by and sees another erect improvements on it in the belief that he has the title or an interest in it, and does not interfere to prevent the work or inform the party of his own title. There is in such conduct a manifest intention to deceive or such gross negligence as to amount to constructive fraud. The owner, therefore, in such a case will not be permitted afterwards to assert his title, and recover the property, at least without making compensation for the improvements. *But this salutary principle can not be invoked by one who, at the time the improvements were made, was acquainted with the true character of his own title, or with the fact that he had none.*"

A final inquiry remains. Is our betterment legislation constitutional? Does it not impair the rights of private property? It gives the occupying claimant of land a privilege of buying it from the rightful owner at a valuation that may be placed upon it by a jury, or if he declines, the owner must pay to him the value of his improvements as found by a jury before he can be let into possession of his own. Is not this a taking of property for private use?

It has been with great difficulty and after no little struggle that acts of this kind have been upheld. They invade the rights of private property.

Childs vs. Shower, 18 Iowa, 268.

A statute requiring the owner before he can recover for use and occupancy, to tender the occupant payment for improvements has been held unconstitutional in Texas.

Hearn vs. Camp, 18 Texas, 545.

Another authorizing a general judgment for value of improvements against the owner of the land and its enforcement by general execution was held invalid in Iowa.

Childs vs. Shower, 18 Iowa, 271.

A provision requiring repayment to the occupant of the purchase money paid by him for the land, was declared invalid in Minnesota.

Madland vs. Benland, 24 Minn., 372, 378-9.

It will be found that most of the States limit the occupant's right to offsetting the value of improvements against damages and mesne profits. A few make the value of improvements a lien on the land.

Sedgwick & Wait, Trial of Title, secs. 690, 691.

A statute very similar to this of Dakota was held unconstitutional in Ohio.

McCoy vs. Grandy, 3 Ohio State, 463.

The case of Green vs. Biddle, (8 Wheaton 1) is very much in point. It involved the occupying claimant law of Kentucky. That law was similar to Dakota's in giving the occupying claimant preference for his improvements, the owner of the land if electing to take them, to give bond and security to pay for them, with interest, in a specified time. If he failed to do this, the occupant had the option to have a judgment entered for the assessed value of his improvements, or to keep the land, giving bonds and security to pay its assessed value. The law was declared unconstitutional. Justice Johnson said of it (p. 103) "The inconsistency that strikes every one in considering the laws, as they now stand is, that one party should have a verdict, and another finally, the judgment; that *eadem flatu*, the plaintiff should be declared entitled to recover land, and yet not entitled to recover land." Justice Washington, pronouncing the opinion of the court, said: "Nothing; in short, can be more clear, upon principles of law and reason, than that a law which denies to the owner of land a remedy to recover the possession of it when withheld by any person, however innocently he may have obtained it, or to recover the profits received from it by the occupant; or which clogs his recovery of such possession and profits, by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to and interest in the property."

If such a statute can be upheld, then all a trespasser need do is, get a color of title from some one, shut his eyes and ears to information, maintain possession in good faith, erect improvements, and by a jury's help get the land from the rightful owner at a small figure or sell the improvements to him at a high one. Such legislation is clearly forbidden the Territory of Dakota, (U. S. Rev. Statutes Secs. 1881, 1925) and the act of Congress of June 1, 1874 was not intended to validate it.

The eighth rule of the Supreme Court requires that in all cases brought here by appeal, a copy of the opinion of the court below be annexed to and transmitted with the record. This seems not to have been done in the present case, and instead of suggesting its absence and having it supplied in the record, we reproduce it here. It will be seen that as to two of the propositions involved,—treated in this argument as the first and third,—reference is made to an opinion filed in another case (Hawke vs. Deffebach) decided at the same term and now also on appeal here (No. 564). As this case will be submitted at the same time as ours, and the counsel for appellee will in his brief reproduce the opinion filed therein we do not care to include it, but refer this court to it for a fuller statement of what the court decided in our case. The opinion in each instance was rendered by Church, Justice. In our case it will appear in the forthcoming 3d Dakota and is also found in 22 N. W. Rep. 491:

> This case while similar in the form of its pleadings. and in many of the facts presented, to the cases of Hawke vs. Deffebach and Hawke vs. Edwards, (22 N. W. Rep. 480) so that the determination of those cases would in any event, dispose of this also, yet differs from them in one important feature. In the cases referred to the premises in controversy formed a part of what was known as the town-site of Deadwood, and application was made by the probate judge of Lawrence county to enter the same for patent under the provisions of the town-site statutes, and indeed an entry was made by him which was afterward canceled as to the premises there in controversy, by order of the land department. In the present case, the land in controversy forms part of what is

known as the town-site of Central City, but it is nowhere alleged in the answer, nor does it in anywise appear, that any entry of these lands for town-site purposes was ever attempted, either by the probate judge or by anyone else for or on behalf of the inhabitants of that town, or that any steps have ever been taken by the defendants or their grantors, or any other person for or on their behalf to acquire the legal title to this land from the government. A protest seems to have been filed against the claims of the plaintiffs, upon which the parties were heard in the land department; but this is all that appears to have been done on behalf of the town-site occupants. But where occupancy and improvement of public lands give no vested interest therein, nor in anywise impair or interfere with the right of disposal thereof by the United States, under the laws regulating the sale of such lands, (Doll vs. Meador, 16 Cal., 295; Drew vs. Valentine 18 Fed. Rep. 712; Frisbie vs. Whitney, 9 Wall 187; The Yosemite Valley Case, 15 Wall. 77; Shepley vs. Cowan 91 U. S. 338,) to entitle a party to the relief demanded in defendants' first counter-claim, it must appear affirmatively that his equity is superior to that of the holder of the legal title, that his adversary's patent is all that stands between him and the legal title; and that if that were out of the way, he would be entitled to the patent. Boggs vs. Merced Mining Co. 14 Cal. 279, 365; Nessler vs. Bigelow, 60 Cal. 98: Aurrecoechia vs. Sinclair, Ibid. 536, at 545, 549; Drew vs. Valentine, supra; Stark vs. Starr, 6 Wall. 418; Smelting Co. vs. Kemp 104 U. S. 636 at 647: Simmons vs. Ogle, 105 U. S. 271 at 278; Steele vs. St. Louis Smelting Co., 106 U. S. 447, at 454. Manifestly, therefore the defendants are in no position to assail the legal title in the hands of the plaintiffs. If any error was committed by the department in issuing a patent to the plaintiffs, it did not, in law, operate to the prejudice of the defendants and they have no standing in court to arrest this counter-claim.

Upon that branch of the case presented by the second counter-claim, involving the question of defendants' right to compensation for improvements, although it appears from the answer that the land department once erroneously determined that the patent to be issued to the plaintiffs should contain exceptions and reservations of the surface rights and improvements of the town-site occupants, which determination the department subsequently, and without notice, it is said, reversed; yet the defendants were bound to know the law regulating the disposal of these lands. As we have already observed, they took no steps to acquire the title. There is no allegation of fraud or other misconduct on the part of the plaintiffs. Whatever improvements defendants made were erected in the face of an adverse claim, of which they had full notice, and we think that what we have said in disposing of this question in the two former cases, will, in all essential respects apply to this case.

We respectfully submit that the demurrer in each instance was properly sustained, that the appellants in neither of their counter-claims succeeded in stating a cause of action or a lawful counter-claim against the appellees, and that the judgment of the trial court was right.

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J. W. SMITH,
Att'ys for Appellees.